DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-464
Title: Kerri L. Kaley, et vir, Petitioners
v.
United States
Docketed: October 15, 2012
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (10-15048)
Decision Date: April 26, 2012
Rehearing Denied: July 17, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Oct 11 2012	Petition for a writ of certiorari filed. (Response due November 14, 2012)
Nov 6 2012	Order extending time to file response to petition to and including December 14, 2012.
Nov 14 2012	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Dec 5 2012	Order further extending time to file response to petition to and including January 14, 2013.
Jan 7 2013	Order further extending time to file response to petition to and including February 13, 2013.
Feb 13 2013	Brief of respondent United States filed.
Feb 27 2013	DISTRIBUTED for Conference of March 15, 2013.
Mar 18 2013	Petition GRANTED.
Apr 3 2013	The time to file the joint appendix and petitioners' brief on the merits is extended to and including June 21, 2013.
Jun 13 2013	The time to file the joint appendix and petitioners' brief on the merits is further extended to and including July 1, 2013.
Jun 13 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Jul 1 2013	Brief amicus curiae of Cato Institute filed.
Jul 1 2013	Brief of petitioners Kerri L. Kaley, et vir filed.
Jul 1 2013	Joint appendix filed. (Statement of costs filed.)
Jul 3 2013	Brief amicus curiae of California Attorneys for Criminal Justice filed.
Jul 5 2013	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jul 8 2013	Brief amicus curiae of American Bar Association filed.
Jul 8 2013	Brief amici curiae of Gun Owners Foundation, et al. filed.

Jul 8 2013	Brief amicus curiae of Institute for Justice filed.
Jul 8 2013	Brief amicus curiae of Florida Association of Criminal Defense Lawyers filed.
Jul 8 2013	Brief amicus curiae of New York Council of Defense Lawyers filed.
Jul 10 2013	The time to file respondent's brief on the merits is extended to and including August 30, 2013.
Jul 22 2013	CIRCULATED.
Jul 23 2013	SET FOR ARGUMENT on Wednesday, October 16, 2013.
Aug 16 2013	Record Received from U.S.C.A. for 11th Circuit (1 envelope)
Aug 22 2013	Record received from the U.S.D.C. of Florida (1 Box)
Aug 30 2013	Brief of respondent United States filed. (Distributed)
Sep 30 2013	Reply of petitioner Kerri L. Kaley, et vir filed. (Distributed)
Oct 16 2013	Argued. For petitioner: Howard Srebnick, Miami, Fla. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

12 No. 464

Supreme Court, U.S.
FILED
OCT 11 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

KERRI L. KALEY and BRIAN P. KALEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

HOWARD SREBNICK
Counsel of Record
BLACK, SREBNICK, KORNSPAN & STUMPF, P.A.
201 South Biscayne Blvd., Suite 1300
Miami, FL 33131
(305) 371-6421
HSrebnick@RoyBlack.com

G. RICHARD STRAFER
G. RICHARD STRAFER, P.A.
201 South Biscayne Blvd., Suite 1380
Miami, FL 33131
(305) 374-9091
StraferPA@aol.com

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COL

QUESTION PRESENTED FOR REVIEW

Title 18 U.S.C. § 853(e) authorizes a district court, upon an *ex parte* motion of the United States, to restrain an indicted defendant's assets that are subject to forfeiture upon conviction. The statute does not provide for a post-restraint, pretrial adversarial hearing at which the indicted defendant may challenge the propriety of the restraints.

In *United States v. Monsanto*, 491 U.S. 600 (1989), this Court rejected a Fifth and Sixth Amendment challenge to the restraint of an indicted defendant's assets needed to pay counsel of choice but, in a footnote, explicitly left open the question – by then already dividing the circuits – "whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed." *Id.* at 615 n.10.

Since 1989, the circuit courts have continued to wrestle with the issue, producing a firmly entrenched split among the eleven circuits that have addressed it.

Acknowledging the widespread conflict, the Eleventh Circuit held that assets needed to retain counsel of choice may remain frozen through trial based solely on a restraining order obtained *ex parte*, despite a defendant's timely demand for a hearing to challenge the viability of the charges and forfeiture counts that purportedly justify the pretrial restraint. *United States v. Kaley*, 677 F.3d 1316 (11th Cir. April 26, 2012) ("*Kaley II*"), App. 1-31.

QUESTION PRESENTED FOR REVIEW
Continued

Thus, the question presented in this petition, which would resolve a split in the circuits, is:

> When a post-indictment, *ex parte* restraining order freezes assets needed by a criminal defendant to retain counsel of choice, do the Fifth and Sixth Amendments require a pretrial, adversarial hearing at which the defendant may challenge the evidentiary support and legal theory of the underlying charges?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioners, Kerri L. Kaley and Brian P. Kaley, were the defendants in the district court and were the appellants in the Eleventh Circuit. The Kaleys are individuals. Thus, there are no disclosures to be made by them pursuant to Supreme Court Rule 29.6.

The Respondent is the United States of America.

Jennifer Gruenstrass was a party defendant in the district court. While the Kaleys were pursuing their interlocutory appeals in the Eleventh Circuit, Gruenstrass went to trial and was acquitted.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	5
A. Introduction	5
B. The Pre-Indictment Investigation And Retention Of Counsel Of Choice	7
C. The Initial Proceedings In The District Court	8
D. The Eleventh Circuit's Decision In *Kaley I*	10
E. The Remand From *Kaley I*	14
F. The Eleventh Circuit's Opinion In *Kaley II*	15

TABLE OF CONTENTS – Continued

Page

REASON FOR GRANTING THE PETITION 18

The Court Should Grant Review To Resolve A Long-Standing Circuit Split Concerning A Criminal Defendant's Fifth And Sixth Amendment Right To A Pretrial, Adversarial Hearing To Challenge A Restraining Order, Entered *Ex Parte*, That Freezes Assets Needed To Retain Counsel Of Choice 18

A. The Pre-*Monsanto* Circuit Split Caused By *Bissell* 18

B. The Supreme Court Rulings In *Caplin & Drysdale* And *Monsanto* 22

C. The Circuit Split Continues 23

D. The Views Of The Tenth And Eleventh Circuits Represent A Significant Departure From This Court's Due Process Precedents 29

E. This Court Granted Certiorari To Decide Whether Property Owners In *Civil* Forfeiture Cases Had A Due Process Right To A Post-Seizure, Pretrial Adversarial Hearing 33

CONCLUSION 39

TABLE OF CONTENTS – Continued

Page

APPENDIX

Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit (April 26, 2012) ..... App. 1

Order of the United States District Court for the Southern District of Florida (October 25, 2010) ..... App. 38

Order of the United States District Court for the Southern District of Florida (March 29, 2010) ..... App. 44

Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit (August 18, 2009) ..... App. 48

Opinion and Order of the United States District Court for the Southern District of Florida (June 25, 2007) ..... App. 94

Order of the United States District Court for the Southern District of Florida (May 2, 2007) ..... App. 105

Order of the United States Court of Appeals for the Eleventh Circuit on Petition for Rehearing (July 17, 2012) ..... App. 113

Order of the United States District Court for the Southern District of Florida (granting Motion to Stay pending Petition for Writ of Certiorari) (September 20, 2012) ..... App. 115

TABLE OF AUTHORITIES

Page

CASES:

Alvarez v. Smith, 558 U.S. 87 (2009) 34, 35, 36, 37

Barker v. Wingo, 407 U.S. 514 (1972) .....*passim*

Barry v. Barchi, 443 U.S. 55 (1979).....30

Bell v. Burson, 402 U.S. 535 (1971) 32

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989).....5, 22

Coleman v. Watt, 40 F.3d 255 (8th Cir. 1994).....36

Connecticut v. Doehr, 501 U.S. 1 (1991) 30

Fuentes v. Shevin, 407 U.S. 67 (1972).....32

Harmelin v. Michigan, 501 U.S. 957 (1991) 30

In re Caplin & Drysdale, 837 F.2d 637 (4th Cir. 1988), *aff'd*, *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) 20

Krimstock v. Kelly, 306 F.3d 40 (2d Cir. 2002).....35, 36

Marshall v. Jerrico, 446 U.S. 238 (1980).....31

Mathews v. Eldridge, 424 U.S. 319 (1976).....*passim*

Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).....13, 32, 33

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).....32

People v. One 1998 GMC, 960 N.E.2d 1071, 355 Ill. Dec. 900, 2011 IL 110236 (Ill. 2011) 36

Smith v. City of Chicago, 524 F.3d 834 (7th Cir. 2008).....35

TABLE OF AUTHORITIES – Continued

Page

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 32

United States v. Bissell, 866 F.2d 1343 (11th Cir. 1989), *cert. denied*, 493 U.S. 876 (1989) ..... *passim*

United States v. Crozier, 674 F.2d 1293 (9th Cir. 1982), *vacated on other grounds*, 468 U.S. 1206 (1984) 20, 21

United States v. Crozier, 777 F.2d 1376 (9th Cir. 1985) 20, 23, 24

United States v. $8,850 in U.S. Currency, 461 U.S. 555 (1983) ..... *passim*

United States v. E-Gold, Ltd., 521 F.3d 411 (D.C. Cir. 2008) 6, 15, 16, 28, 29

United States v. Farmer, 274 F.3d 800 (4th Cir. 2001), *cert. denied*, 543 U.S. 1022 (2002) 24

United States v. Funds Held ex rel. Wetterer, 210 F.3d 96 (2d Cir. 2000) 32

United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) 33

United States v. Goodrich, 871 F.2d 1011 (11th Cir. 1989) 12

United States v. Harvey, 814 F.2d 905 (4th Cir. 1987) 20

United States v. Holy Land Found., 493 F.3d 469 (5th Cir. 2007) 25

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 30, 31

TABLE OF AUTHORITIES – Continued

Page

United States v. Jamieson, 427 F.3d 394 (6th Cir. 2005) 27

United States v. Jones, 160 F.3d 641 (10th Cir. 1998) 25, 26, 27, 28

United States v. Lewis, 759 F.2d 1316 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985) 20, 24, 26

United States v. Lewis, Crim. No. 04-403, 2006 U.S. Dist. LEXIS 36134 (D. Minn. June 1, 2006) 27

United States v. Long, 654 F.2d 911 (3d Cir. 1981) 20, 24, 26

United States v. Michelle's Lounge, 39 F.3d 684 (7th Cir. 1994) 24

United States v. Miller, 997 F.2d 1010 (2d Cir. 1993) 12

United States v. Monsanto, 836 F.2d 74, 85 (2d Cir. 1987) 20

United States v. Monsanto, 491 U.S. 600 (1989) ..... *passim*

United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991) ("*Monsanto IV*") 6, 15, 24, 28

United States v. Moya-Gomez, 860 F.2d 706 (7th Cir. 1988) 20, 21, 24

United States v. Mueller, No. 08-Cr-0206 (PJS/FLN), 2008 U.S. Dist. LEXIS 62921 (D. Minn. July 18, 2008) 27

TABLE OF AUTHORITIES – Continued

Page

United States v. Real Property in Waterboro, 64 F.3d 752 (1st Cir. 1995) 39

United States v. Roth, 912 F.2d 1131 (9th Cir. 1990) 23

United States v. Simms, No. 12-701 (EGS), 2012 U.S. Dist. LEXIS 93052 (D. D.C. July 6, 2012) 29, 30, 36

United States v. Thier, 801 F.2d 1463 (5th Cir. 1986), *modified on other grounds*, 809 F.2d 249 (5th Cir. 1987) 20, 25

United States v. Von Neumann, 474 U.S. 242 (1986) 35, 36

United States v. Yusuf, 199 Fed. Appx. 127 (3d Cir. 2006) 26

CONSTITUTIONAL AND STATUTORY AUTHORITY:

U.S. CONST. amend. V ..... *passim*

U.S. CONST. amend. VI ..... *passim*

U.S. CONST. amend. XIV 32

18 U.S.C. § 371 4

18 U.S.C. § 853 ..... 2, 5

18 U.S.C. § 853(e) 21, 25

18 U.S.C. § 1963 ..... 18, 19

18 U.S.C. § 1963(b) 18

18 U.S.C. § 2314 4

TABLE OF AUTHORITIES – Continued

Page

21 U.S.C. § 848 ..... 18, 19

21 U.S.C. § 848(d) 18

21 U.S.C. § 853 19

OTHER AUTHORITIES:

Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statements, Fiscal Year 2011, U.S. Dept. of Justice, Office of Inspector General, January 2012 31

Fed. R. Civ. P. 65 ..... 19, 23

Comprehensive Crime Control Act, Pub. L. No. 98-473, 98 Stat. 1976 (1984) 18

Maguire, Kathleen, ed., "Sourcebook of Criminal Justice Statistics," U.S. Department of Justice, Bureau of Justice Statistics (Albany, NY: University of Albany, School of Criminal Justice, Hindelang Criminal Justice Research Center, 2009) Table 4.45.2010 31

S. Rep. No. 225, 98th Cong., 2d Sess. 191, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182 19

PETITION FOR WRIT OF CERTIORARI

Kerri L. Kaley and Brian P. Kaley respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's final opinion, App. 1-37, is reported at 677 F.3d 1316. The Eleventh Circuit's preliminary opinion, App. 48-93, is reported at 579 F.3d 1246. The relevant orders of the District Court, App. 38-47, 94-117, are unreported.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its decision on April 26, 2012, App. 1-37, and denied rehearing on July 17, 2012, App. 113-14. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be . . . deprived of . . . property, without due process of law. . . ." U.S. CONST. amend. V.

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

Title 18 U.S.C. § 853 provides, in pertinent part:

Criminal forfeitures

(a) Property subject to criminal forfeiture. Any person convicted of a violation of this title . . . shall forfeit to the United States. . . .

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation. . . .

(e) Protective orders.

(1) Upon application of the United States, the court may enter a restraining order . . . to preserve the availability of property described in subsection (a) for forfeiture under this section –

(A) upon the filing of an indictment . . . charging a violation of this title . . . for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought

would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that –

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered: *Provided, however,* That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with

respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order. . . .

Title 18 U.S.C. § 2314 provides, in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person or persons to travel in, or to be transported in interstate or foreign commerce in the execution or concealment of a scheme or artifice to defraud that person or those persons of money or property having a value of $5,000 or more; . . . [s]hall be fined under this title or imprisoned not more than ten years, or both. . . .

Title 18 U.S.C. § 371 provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any

> purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. . . .

STATEMENT OF THE CASE

A. Introduction

In *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989), this Court rejected a Fifth and Sixth Amendment challenge to the federal statute (18 U.S.C. § 853) that allows for the forfeiture of tainted funds used to pay counsel of choice. In a companion case, *United States v. Monsanto*, 491 U.S. 600 (1989), this Court approved the pretrial restraint of those allegedly tainted assets needed to pay counsel of choice, writing: "assets in a defendant's possession may be restrained . . . based on a finding of probable cause to believe that the assets are forfeitable."

In a footnote to the *Monsanto* opinion, this Court explicitly left open the question – by then already dividing the circuits – "whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed." *Monsanto*, 491 U.S. at 615 n.10. In the twenty-three years since *Caplin & Drysdale* and *Monsanto*, the circuit split has become further entrenched. To date, all but one of the twelve circuit courts of appeals have addressed the issue.

The Eleventh Circuit, in the course of two interlocutory appeals in this case, held that assets needed

to retain counsel of choice may remain frozen through trial based solely on a restraining order obtained *ex parte*, despite a defendant's timely demand for a hearing to challenge the viability of the charges and forfeiture counts that purportedly justify the pretrial restraints. *United States v. Kaley*, 677 F.3d 1316 (11th Cir. April 26, 2012) ("*Kaley II*"), App. 1-31.

In a specially concurring opinion in the first interlocutory appeal, Judge Tjoflat, noting the circuit split, concluded that "the Kaleys are entitled to a pretrial hearing on the merits of the protective order," and that the case should have been "remanded to the district court with instructions to afford the Kaleys a pretrial hearing at which they could show that the Government did not have probable cause to restrain their assets." *United States v. Kaley*, 579 F.3d 1246, 1267-68 and n.14 (11th Cir. 2009) ("*Kaley I*") (Tjoflat, J., concurring), App. 75, 92-93.

In the second interlocutory appeal from the district court's order denying relief after remand, Judge Edmondson's concurring opinion expressed "deep doubts" about the majority opinion, recognized that the case "touches on the fundamentals and, thus, impresses [him] as being unusually important," and acknowledged that "if [he] were deciding the case alone, [he] expect[s] he would reach a different result and write something largely in line with *United States v. Monsanto*, 924 F.2d 1186 (2d Cir. 1991) (en banc), and *United States v. E-Gold, Ltd.*, 521 F.3d 411 (D.C. Cir. 2008)." *Kaley II*, 677 F.3d at 1330 (Edmondson, J., concurring), App. 32.

The district court has stayed the arraignment and trial of this case pending disposition of this petition for a writ of certiorari. App. 115-17. Absent the pretrial hearing sought by petitioners, they will be denied access to the funds they need to retain counsel of choice to defend them at trial against the very accusation that threatens to permanently deprive them of those funds . . . and their freedom.

This Court should grant the petition for a writ of certiorari to resolve the long-standing circuit split on what Judge Edmondson characterizes as an issue that "touches on the fundamentals and, thus, impresses [him] as being unusually important."

B. The Pre-Indictment Investigation And Retention Of Counsel Of Choice

In January 2005, Petitioner Kerri L. Kaley, a sales representative for a subsidiary of Johnson & Johnson, Inc. ("J&J"), learned that she and her husband, Petitioner Brian Kaley, were targets of a Florida grand jury investigation. R17:4; R20. The government claimed that the Kaleys and other J&J sales representatives were obtaining from hospitals prescription medical devices ("PMDs") – such as sutures, trocars and other devices used during surgery – that J&J had previously sold to those hospitals and were reselling them on a gray market. R17:4.

The Kaleys retained counsel to represent them in what turned out to be a two-year investigation. During that period, counsel interviewed witnesses,

investigated J&J's onerous return policies (which were largely responsible for the creation of the gray market), reviewed countless documents, researched legal issues and conferred with the prosecutors. R17:4-6.

When settlement discussions collapsed and an indictment was presumably forthcoming, the Kaleys applied for a $500,000 credit line on a home they had owned for more than a decade to raise funds necessary to pay their counsel to defend them at the anticipated trial. R17:7. On the advice of their bank, the Kaleys used the credit line funds to buy a certificate of deposit ("CD"), which would earn interest to partially offset the interest expense on the home equity loan until they were indicted. *Id.* No indictment was returned in 2006. In early 2007, the Kaleys deposited an additional $63,000 into the CD, earned from sources other than their residence. *Id.*

C. The Initial Proceedings In The District Court

In February 2007, the Kaleys were indicted, along with Jennifer L. Gruenstrass (another J&J sales representative), for conspiring to traffic in "stolen" PMDs and money laundering. R1, 45.[1] The original and superseding indictments included a forfeiture count and were accompanied by restraining

---

[1] The Kaleys and Gruenstrass were also charged with one count of obstruction of justice.

orders, obtained *ex parte*, that selectively froze *only* the Kaleys' assets, including their marital residence and the CD. R1:10; R5-6. The Kaleys promptly challenged the orders, arguing that they were constitutionally entitled to a pretrial adversarial hearing where the government would have to prove that it was likely to prevail at trial in order to justify denying the Kaleys the use of their assets to retain their counsel of choice for that very trial. R17. The government opposed the motion, arguing that under *United States v. Bissell*, 866 F.2d 1343 (11th Cir. 1989), *cert. denied*, 493 U.S. 876 (1989), the only adversarial hearing the Kaleys were entitled to *was* their trial. Alternatively, the government argued that the Kaleys could have a hearing to contest the *tracing* of restrained assets to the crimes but only if the Kaleys first proved that they could not retain counsel by liquidating every unrestrained asset worth over $500. R27:8-10.

Agreeing with the government, a magistrate judge convened a limited hearing to examine the Kaleys' available assets and determine whether the $63,000 that had been added to the CD was traceable to the crimes charged. R 68, 99. After barring the Kaleys from putting on evidence to show that the PMDs were never stolen by anyone R99:94-96, the magistrate judge denied the Kaleys' motions, finding "probable cause" to believe that they would be convicted based only on the indictment, as supplemented by an agent's *ex parte* affidavit. App. 109; R80-82. The magistrate judge also found that the Kaleys' Sixth

Amendment right to counsel of choice was not violated because they could retain other "competent" counsel for less money if they liquidated all their other assets. App. 110-11.

The district court adopted most of these rulings, holding that the Kaleys were not entitled to any kind of adversarial hearing under the four-factor "speedy trial" test in *United States v. $8,850 in U.S. Currency*, 461 U.S. 555 (1983), and *Barker v. Wingo*, 407 U.S. 514 (1972), adopted by the Eleventh Circuit in *Bissell*. App. 94-104. The district court agreed only to release the $63,000 as unconnected to the alleged crimes. App. 104; R123:4. The district court then stayed the Kaleys' criminal trial pending their interlocutory appeal.

D. The Eleventh Circuit's Decision In *Kaley I*

In their first interlocutory appeal to the Eleventh Circuit (*Kaley I*), the Kaleys argued that they were constitutionally entitled to a pretrial adversarial hearing on the strength (or lack thereof) of the government's case for two reasons. First, they argued that the district court had misapplied the *$8,850/ Barker* factors and that *Bissell* did not create a bright-line rule limiting pretrial hearings to the issue of "tracing." Second, they argued that to the extent *Bissell* precluded a hearing, it was wrongly decided and that *Mathews v. Eldridge*, 424 U.S. 319 (1976), not *$8,850* and *Barker*, provided the proper constitutional framework to determine their due process

rights. The government maintained its position that the only process due the Kaleys was their criminal trial and that requiring a pretrial hearing would risk the "damaging premature disclosure of the government's case and trial strategy." *See Kaley I*, Brief for the United States (Sept. 26, 2007), at p. 31.

Meanwhile, co-defendant Gruenstrass – whose assets had not been frozen and who thus had retained her counsel of choice – moved for a continuance of her trial pending the outcome of the Kaleys' appeal. R131. Despite its alleged concern over "damaging premature disclosure[s]" to the Kaleys, the government *opposed* the continuance and demanded that Gruenstrass be tried immediately. R135. The district court agreed but forced the government to first provide a bill of particulars identifying who "owned" the allegedly stolen PMDs. Apparently because no hospital was claiming to be the victim of the alleged thievery, the government instead identified J&J as the "owner" of the PMDs, even though J&J had been paid in full for the devices by their hospital customers. Under the government's "constructive trust" theory, when hospital staff gave the unwanted PMDs to a J&J sales representative like Ms. Kaley – with no expectation of a refund – the sales representative was nevertheless holding those unwanted PMDs in "constructive trust" for J&J, so J&J thereby became the owner again (without paying anyone for the PMDs). Notwithstanding binding case law in the Eleventh Circuit

rejecting this constructive trust theory of property in the context of a criminal prosecution,[2] this fatal defect went unnoticed, and Gruenstrass proceeded to trial. She was acquitted anyway.

When the Eleventh Circuit issued its opinion in *Kaley I*, it left the core constitutional issues unresolved. The majority opinion felt bound by *Bissell*, although stating that "[i]f we were writing on a blank slate today we would be inclined . . . to apply the test announced by the Supreme Court in *Mathews*." App. 72. However, the majority reversed the district court for misapplying the *Barker* factors and remanded to "re-weigh" them "in order to calculate whether the Kaleys [were] entitled to a post-indictment pretrial evidentiary hearing." App. 72, 75. The majority did not specify the *scope* of such a hearing but cautioned that its purpose "would not be to determine guilt or innocence but, rather, to determine the propriety of the seizure." App. 68. The Kaleys bore the burden of proof, thus "sav[ing]" the government "from having to preview its entire case." *Id.* The majority acknowledged that, in the interim, the government had tried Ms. Gruenstrass, App. 65, but did not address whether the district court was now free to consider either that trial record or the flawed theory of prosecution in "determining the propriety of the seizure." The majority suggested only that the hearing could mirror the

---

[2] *See United States v. Goodrich*, 871 F.2d 1011 (11th Cir. 1989); *accord United States v. Miller*, 997 F.2d 1010, 1021 (2d Cir. 1993).

"approach" of the prejudgment attachment hearing in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). App. 68.

In a concurring opinion, Judge Tjoflat believed that most of the language in *Bissell* was *dicta* and that the proper due process test was the one set forth in *Mathews*. App. 80. As Judge Tjoflat recognized, the *Mathews* test weighs the (1) private interest affected by the restraint, (2) risk of erroneous deprivation through the procedures used and the probable value of additional procedural safeguards, and (3) the prejudice to the government. *Id.* The Kaleys' interests, Judge Tjoflat found, were enormous. "Delaying the due process hearing until trial will only temporarily deprive the Kaleys of their property rights, but it will completely eviscerate their right to counsel of choice." App. 88-89. The risk of an erroneous deprivation likewise weighed in the Kaleys' favor because neither a prosecutor's judgment, a grand jury's *ex parte* finding of probable cause nor an agent's *ex parte* affidavit were likely to protect a defendant "against an erroneous deprivation." App. 90-91. Also citing *Mitchell* as a guide, Judge Tjoflat stated that at the hearing, the Kaleys could challenge "the merits" but the burden would be on them to "show that the Government did not have probable cause to restrain their assets." App. 91-92.

E. The Remand From *Kaley I*

On remand, the district court re-weighed the *Bissell* factors and, this time, held "that the equities lie in favor of Defendants and an evidentiary hearing to determine the propriety of the pretrial seizure of Defendants['] [property] is warranted." App. 47. The hearing the district court then convened, however, was no different from the one held in 2007. The Kaleys conceded that they were not contesting the "traceability" of the house and CD to the *alleged* crimes but proffered evidence that the PMDs were not stolen from anyone – the record from Ms. Gruenstrass' trial, as well as additional evidence concerning J&J's return policies. R233:15-31, 196, 221.[3] The government continued to maintain that the Kaleys had no right to contest any issue other than "traceability" and that the district court had no discretion to refuse to continue the restraining order, despite the dearth of evidence at Ms. Gruenstrass' trial and the defects in the Indictment. R233:34-35, 43. The district court agreed with the government, declined to consider the Kaleys' arguments and enforced the restraining order. App. 38-43.

---

[3] The Kaleys did not concede that "probable cause" was the appropriate standard of proof but argued that they would prevail under any standard because the government based the prosecution on a legally defective theory of "property."

F. The Eleventh Circuit's Opinion In *Kaley II*

The district court stayed the case to allow the Kaleys to take a second interlocutory appeal. This time, the Eleventh Circuit affirmed. The majority opinion held unequivocally that "[t]o the extent that *Kaley I* did not settle the issue, we now hold that at a pretrial, post-restraint hearing required under the *Bissell* test, the petitioner may not challenge the evidentiary support for the underlying charges." App. 15. The majority further held that even though the Kaleys had prevailed under the *Bissell-Barker* test on remand from *Kaley I*, the *only* hearing that *Bissell* permitted was about traceability. App. 24. The court of appeals held that the Kaleys' Sixth Amendment concerns could be satisfied through court appointed counsel. App. 25.

Judge Edmondson wrote a concurring opinion that essentially agreed with Judge Tjoflat's concurring opinion in *Kaley I*:

> I concur in today's result. I concur because I cannot say with strong confidence that my colleagues on the panel are incorrect in the way they see the law working. But I concur with deep doubts. And if I were deciding the case alone, I expect I would reach a different result and write something largely in line with *United States v. Monsanto,* 924 F.2d 1186 (2d Cir.1991) (en banc), and *United States v. E-Gold, Ltd.,* 521 F.3d 411 (D.C.Cir.2008).

App. 32.

Judge Edmondson posited that when the government wished to impose a restraining order as an "add on to ordinary prosecution," due process required an evidentiary hearing "about probable cause on both the predicate criminal offense and the forfeitability (traceability of assets to supposed crime) of the specified property." App. 33-34. The government would then be free to "decide for itself what cards to show before the actual trial; the worst that will happen is that the pretrial restraint on property will not continue. . . ." App. 34. Judge Edmondson ended his opinion by emphasizing the importance of these issues to our entire system of justice:

> The potential for the dominating power of the Executive Branch to be misused by the arbitrary acts of prosecutors is real. The courts must be alert. To hear from the other side at a time when it matters (in this instance, before the criminal trial: a trial without counsel of the defendant's choice) is the basic and traditional way that American judges assure things are fair. So, I do think that *Monsanto* and *E-Gold*, as law decisions, are very possibly on the right tack: stressing judicial responsibility and requiring a broader hearing to keep up a pretrial restraint on property when the restraint interferes with a citizen's abilities to employ legal counsel of his choice to defend him in a criminal proceeding.

* * *

> I have voiced my doubts, but I cannot firmly conclude that the legal position my experienced, able colleagues have taken is definitely erroneous. Therefore, I do not dissent, although I am uneasy that the limits that we set today for the hearing essential to continue a pretrial restraint on property might well be too limiting under the Constitution.

App. 36-37.

The Kaleys petitioned for rehearing en banc, which the Eleventh Circuit denied on July 17, 2012. App. 113-14. The Kaleys then moved the district court to stay the trial proceedings pending the disposition of this petition for a writ of *certiorari*. In an order granting the stay, the district wrote:

> Defendants have properly exercised their right to appellate review, and the [sic] they were vindicated in their first interlocutory appeal. The government has acknowledged that if the Supreme Court agrees to review the appellate decision, the case will once again have to be put on hold. In view of the extensive delay that has already occurred and the prospect that the case will once again have to be stayed if the Supreme Court grants review, this Court concludes that the equities weigh in favor of granting a stay for the relatively short additional period of time required for the Supreme Court to consider Defendants [sic] petition for review, rather than possibly improperly forcing Defendants to defend the case without the benefit of the

> assets they claim are necessary to retain counsel of their choice.
>
> In view of the foregoing, Defendants' Motion [for a stay] is GRANTED.

App. 116-17.

REASON FOR GRANTING THE PETITION

THE COURT SHOULD GRANT REVIEW TO RESOLVE A LONG-STANDING CIRCUIT SPLIT CONCERNING A CRIMINAL DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHT TO A PRETRIAL, ADVERSARIAL HEARING TO CHALLENGE A RESTRAINING ORDER, ENTERED *EX PARTE*, THAT FREEZES ASSETS NEEDED TO RETAIN COUNSEL OF CHOICE

A. The Pre-*Monsanto* Circuit Split Caused By *Bissell*.

In 1970, Congress enacted two criminal statutes, 21 U.S.C. § 848 ("CCE") and 18 U.S.C. § 1963 ("RICO"), that for the first time (1) contained *in personam* forfeiture penalties and (2) authorized district courts to restrain the property subject to forfeiture pretrial. *See* 21 U.S.C. § 848(d); 18 U.S.C. § 1963(b). The restraining order provisions, however, included no guidelines for their implementation.

In 1984, Congress expanded the government's forfeiture powers. Through the Comprehensive Crime Control Act, Pub. L. No.98-473, 98 Stat. 1976 (1984),

Congress substantially amended the CCE and RICO restraining order provisions and enacted a new comprehensive statute, 21 U.S.C. § 853. In order to secure a pre-indictment restraining order, Congress required a series of procedural safeguards, including a hearing at which the government had to prove "a substantial probability" of success. *See* pp. 2-3 *supra*.

In contrast, a post-indictment restraining order could be entered merely "upon the filing of an indictment." *Id.* A Senate Report indicated that the absence of procedural safeguards for the post-indictment provision was intentional. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 191, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3385-86.

The defense bar challenged the constitutionality of both the 1970 and 1984 restraining order provisions under the Fifth and Sixth Amendments. The Sixth Amendment challenges focused on whether funds used to pay counsel of choice were completely exempt from forfeiture (and, hence, would also be exempt from pretrial restraint).

While the circuits split on this issue, until the Eleventh Circuit's 1989 opinion in *Bissell*, no other circuit had held that a defendant could be denied a meaningful pretrial opportunity to contest the restraints. Whether required by Rule 65, Fed. R. Civ. P., or as a matter of due process, the Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth Circuits all held that, in the absence of any explicit procedural protections, a defendant was entitled to a pretrial

hearing at which the government would need to at least establish its "likelihood of success in convicting the defendant and obtaining forfeiture of the disputed assets. . . ." *United States v. Monsanto*, 836 F.2d 74, 85 (2d Cir. 1987), *vacated on rehearing en banc on other grounds*, 852 F.2d 1400 (2d Cir. 1988) (*per curiam*), *and rev'd on other grounds*, 491 U.S. 600 (1989); *United States v. Long*, 654 F.2d 911 (3d Cir. 1981); *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987), *rev'd on other grounds sub nom., In re Caplin & Drysdale*, 837 F.2d 637 (4th Cir. 1988) (en banc); *United States v. Thier*, 801 F.2d 1463, 1468-69 (5th Cir. 1986), *modified on other grounds*, 809 F.2d 249 (5th Cir. 1987); *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988); *United States v. Lewis*, 759 F.2d 1316 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985); *United States v. Crozier*, 777 F.2d 1376 (9th Cir. 1985).

Some of these courts expressly rejected the government's contention that a grand jury's finding of probable cause was sufficient due process: "A grand jury determination is not an adequate substitute for an adversary proceeding because a defendant has no opportunity to cross-examine witnesses and the government does not assume the burden of proof. . . ." *United States v. Crozier*, 674 F.2d 1293, 1297 (9th Cir. 1982), *vacated on other grounds*, 468 U.S. 1206 (1984); *accord Harvey*, 814 F.2d at 928; *Long*, 654 F.2d at 915. Some rejected the government's argument, based on *$8,850,* that the defendant's trial

provided all the process that was due: "Relief not obtained prior to the commencement of the criminal trial simply will not be helpful in securing the assistance of counsel of choice at the criminal trial." *Moya-Gomez*, 860 F.2d at 728.

The one potential fissure in these rulings was whether the Fifth Amendment Due Process Clause always required such a hearing without regard to the Sixth Amendment right to counsel of choice issue, *see, e.g., Crozier*, 674 F.2d at 1297, or whether the defendant first had to demonstrate "a bona fide need to utilize assets subject to the restraining order to conduct his defense." *Moya-Gomez*, 860 F.2d at 730.

In 1989, the Eleventh Circuit in *Bissell* disagreed with all existing precedent. Relying on the legislative history of § 853(e), the Eleventh Circuit held that "the defendant may undertake to prove that the government wrongfully restrained specific assets which are outside the scope of the indictment . . . but may not challenge the validity of the indictment itself and thus require that the government present its evidence before trial." *Bissell*, 866 F.2d at 1349. In assessing whether such a scheme was constitutional, the Eleventh Circuit eschewed *Mathews* and, instead, adopted the speedy trial framework in *$8,850* and *Barker*, characterizing the issue as a challenge to "'only the length of time between the seizure and the initiation of the forfeiture trial.'" *Id.* at 1352, quoting *$8,850*, 461 U.S. at 564. The Eleventh Circuit then held that providing the defendant with his trial complied with

due process, recognizing only in passing that its opinion was "contra" to other circuits. *Id.* at 1354 n.7.

B. The Supreme Court Rulings In *Caplin & Drysdale* And *Monsanto*.

Just months after *Bissell* was decided, this Court resolved one of the circuit conflicts, holding that the Fifth and Sixth Amendments did not exempt attorneys fees from forfeiture. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989); *United States v. Monsanto*, 491 U.S. 600 (1989). In *Caplin & Drysdale*, the attorneys did not seek access to the defendant's funds until *after* the defendant was convicted and, therefore, the case did not address whether or under what circumstances a defendant could be precluded *pretrial* from using only *potentially* forfeitable assets to retain counsel of choice.

In *Monsanto*, the government sought to forfeit the defendant's real and personal property as proceeds of drug trafficking, and the district court issued a restraining order freezing those assets pending trial. 491 U.S. at 602-04. When the defendant moved to vacate the order so that he could use the assets to retain an attorney, the district court conducted a four-day evidentiary hearing, after which it concluded that "the Government had 'overwhelmingly established a likelihood' that the property in question would be forfeited at the end of the trial." *Id.* at 605. In light of the lengthy evidentiary hearing and the district court's finding, this Court declined to address the

circuit split created by *Bissell* on the due process question. Nonetheless, at the end of its opinion, the Court added the following: "We conclude . . . that assets in a defendant's possession may be restrained in the way they were here *based on a finding of probable cause* to believe that the assets are forfeitable." *Id.* at 615 (emphasis added). The Court expressly left open the question concerning the procedural due process requirements, including whether "a hearing was required at all" or whether the four day hearing that occurred "was an adequate one." *Id.* at 615, n.10.

C. The Circuit Split Continues.

Since *Monsanto*, the circuit split on the due process question has become both more entrenched and multifaceted.

The Ninth Circuit reaffirmed its support for *Crozier*, *see United States v. Roth*, 912 F.2d 1131, 1333 (9th Cir. 1990), including the requirement that at the pretrial adversarial hearing the government meet the standards set forth in Rule 65, Fed. R. Civ. P.

The Second, Fourth, and Seventh Circuits likewise reaffirmed that due process requires a pretrial hearing, but not the Rule 65 hearing contemplated by the Ninth Circuit. Rather, at the adversarial hearing approved by these circuit courts, the defendant may test "the existence of probable cause as to both the [predicate criminal offense] and the forfeitability of

the specified property. . . ." *United States v. Monsanto*, 924 F.2d 1186, 1197-98 (2d Cir. 1991) (en banc); *accord United States v. Farmer*, 274 F.3d 800 (4th Cir. 2001) ("Considering the three *Mathews* factors as they apply to Farmer, we conclude that due process requires a hearing for him to challenge probable cause."), *cert. denied*, 543 U.S. 1022 (2002); *United States v. Michelle's Lounge*, 39 F.3d 684, 700-01 (7th Cir. 1994) ("At a hearing, the defendant could rebut the government's showing of probable cause – for example, by proof of innocent ownership, or that a government informant is unreliable, or that the property had no connection to drugs.").[4]

---

[4] Given this parenthetical quotation from *Michelle's Lounge*, it appears that Judge Marcus was mistaken when, in *Kaley II*, he counted the Seventh Circuit (citing *Moya-Gomez*) among those circuits that reject *Monsanto*'s requirement of a hearing on probable cause. *Kaley II*, 676 F.3d at 1329. Actually, the Seventh Circuit embraced the Second Circuit's en banc decision after remand in *Monsanto*, explicitly aligned itself with the other circuits that require a hearing, and noted the conflict with the Eleventh Circuit's opinion in *Bissell*:

> Clearly *Moya-Gomez* has lost none of its vitality after the Supreme Court decisions in *Caplin* and *Monsanto*; rather, it is joined by *Monsanto IV* (in which the government conceded that a hearing was required). Several other courts agree that due process requires a hearing when assets are seized in this context through criminal forfeiture. *See Crozier*, 777 F.2d at 1383-84; *United States v. Lewis*, 759 F.2d 1316, 1324-25 (8th Cir.), *cert. denied*, 474 U.S. 994, 106 S.Ct. 406, 88 L.Ed.2d 357 (1985); *United States v. Long*, 654 F.2d 911, 915-16 (3rd Cir.1981); *but see United States v. Bissell*, 866 F.2d 1343, 1354 (11th Cir.), *cert. denied*,

(Continued on following page)

The Fifth Circuit has not re-addressed a criminal defendant's due process rights to challenge a restraining order under 18 U.S.C. § 853(e). However, in an appeal brought by a third-party claimant (not the defendant) challenging a restraining order imposed under 18 U.S.C. § 853(e), the Fifth Circuit en banc held that at a pretrial adversarial hearing the government need only establish probable cause, thus overruling a pre-*Monsanto* case, *United States v. Thier*, 801 F.2d 1463, 1468-69 (5th Cir. 1986), insofar as it had required the government to meet the more rigorous Rule 65 standard. *United States v. Holy Land Found.*, 493 F.3d 469, 474 (5th Cir. 2007) (en banc).

In the face of a mounting body of precedent requiring an adversarial hearing to determine, at a minimum, whether there is probable cause to believe that the asset is forfeitable, the Tenth Circuit concluded that the Due Process Clause requires nothing more than a hearing to determine if the asset is "traceable to the commission of the offense." *United States v. Jones*, 160 F.3d 641, 648 (10th Cir. 1998). While purporting to use the *Mathews* framework, the Tenth Circuit reached the same conclusion as the Eleventh Circuit: "We do not require . . . that the government reestablish probable cause to believe that

---

493 U.S. 876, 110 S.Ct. 213, 107 L.Ed.2d 166 (1989) (defendants did not request a hearing, and no hearing required).

Michelle's Lounge, 39 F.3d at 700.

defendants are guilty of the underlying health care offense." *Id.* And, a defendant would only get a "tracing" hearing if he or she could first "demonstrate to the court's satisfaction that she has no assets" to pay counsel. *Id.*[5]

The Third Circuit has not re-addressed the issue in any published opinion since issuing its pre-*Monsanto* opinion in *Long*. However, in an unpublished opinion, the Third Circuit in *United States v. Yusuf*, 199 Fed. Appx. 127, 132-33 (3d Cir. 2006), followed the Tenth Circuit's decision in *Jones*, holding that "[t]he post-restraint inquiry at the adversarial hearing is limited to the traceability of the restrained assets, and, thus, the government need not reestablish probable cause to believe that defendants are guilty of the underlying offense." Although *Jones* directly conflicts with the Third Circuit's published position in *Long*, *Yusuf* did not distinguish, or even cite, *Long*.

The Eighth Circuit has not spoken since *Monsanto*, but two district courts in that circuit ignored the Eighth Circuit's pre-*Monsanto* decision in *Lewis*, which categorically applied the Rule 65 standard; instead, those two district courts – in unpublished

---

[5] The three traditional burdens of persuasion are preponderance, clear and convincing and beyond a reasonable doubt. The Tenth Circuit did not explain where the "to the court's satisfaction" burden fit within these paradigms.

opinions citing the Tenth Circuit's *Jones* case – have adopted a 2-part test in which a defendant

> is entitled to a post-restraint, pretrial hearing *only if* he demonstrates: (1) he has no assets other than those restrained, with which to retain private counsel and provide for himself and his family; and (2) a prima facie showing of a bona fide reason to believe that the grand jury erred determining that the restrained assets would be subject to forfeiture if the defendant is convicted.

United States v. Lewis, Crim. No. 04-403, 2006 WL 1579855, 2006 U.S. Dist. LEXIS 36134 (D. Minn. June 1, 2006) (internal quotations omitted); *United States v. Mueller*, No. 08-Cr-0206 (PJS/FLN), 2008 WL 2890258, 2008 U.S. Dist. LEXIS 62921 (D. Minn. July 18, 2008).

The Sixth Circuit in *United States v. Jamieson*, 427 F.3d 394 (6th Cir. 2005), also followed the Tenth Circuit in a case in which the defendant "did not object or appeal the district court's decision to use the *Jones* framework and . . . never put forth any arguments that the *Jones* framework should not be applied to his case." 427 F.3d at 406. Moreover, the district court had "provided the defendant with an adversarial hearing and an opportunity to be heard." *Id.* at 407.

Prior to the Eleventh Circuit's opinions in *Kaley I* and *Kaley II*, the last circuit to enter the fray was the

District of Columbia Circuit in *United States v. E-Gold, Ltd.*, 521 F.3d 411 (D.C. Cir. 2008). In *E-Gold*, the government used a civil forfeiture seizure warrant and an indictment with a restraining order to put a money transmitting company out of business. The defendants moved for access to the $1,481,976.38 seized in order to pay counsel of choice and sought an evidentiary hearing "specifically as to the existence of probable cause to believe that the defendants committed" the charged offenses. *Id.* at 413. The district court denied the motion and the defendants appealed.

After adopting the *Mathews* test as the correct analytical framework, the D.C. Circuit reversed, disagreeing with *Jones* and *Bissell* and wholeheartedly joining "the majority of those circuits in holding that the adversarial hearing sought by the appellants is constitutionally required." *Id.* at 419. The D.C. Circuit emphasized that the required hearing would address "'the existence of probable cause as to both the [predicate criminal offense] and the forfeitability of the specified property. . . .'" *Id.* at 418, quoting *Monsanto*, 924 F.2d at 1197. And, like the majority of circuits, the D.C. Circuit added that at such a hearing the defendant would be free to offer "evidence not presented to the grand jury . . . in support of the proposition that there is no probable cause supporting the seizure of the assets." *Id.* at 421. While recognizing "the weightiness of the government's concern in grand jury secrecy," the court found "nothing that outweighs the defendant's constitutional rights to due

process and to counsel under the Fifth and Sixth Amendments." *E-Gold, Ltd.*, 521 F.3d at 419.[6]

D. The Views Of The Tenth And Eleventh Circuits Represent A Significant Departure From This Court's Due Process Precedents

For decades, this Court has applied the cost-benefit analysis of *Mathews* to determine when and how an otherwise unchecked government action will be reviewed by an objective decision maker. *Mathews* offers a time-tested methodology that this Court "has consistently" used, "balancing the parties' interests to determine what constitutes an individual's procedural due process right to be heard 'at a meaningful time and in a meaningful manner' when the government acts to deprive a person of his property, even when the deprivation is temporary and pending the outcome of further proceedings." *United States v. Simms*,

---

[6] Any government interest in grand jury secrecy and not having to prematurely "show its hand" was voluntarily abandoned by the government in the Kaleys' case when it chose to force co-defendant Gruenstrass to trial while the interlocutory appeal in *Kaley I* was pending. The Kaleys were willing to rely on the Gruenstrass trial record, supplemented by additional evidence *the Kaleys* wished to introduce. All the government needed to do – without showing any additional cards – was defend its own indictment based on the trial record of co-defendant Gruenstrass that the government chose to create while the Kaleys were on appeal.

No. 12-701 (EGS), 2012 U.S. Dist. LEXIS 93052, at **26-27 & n.10 (D. D.C. July 6, 2012).[7]

The power of the *Mathews* formulation is apparent from the key role it played when the Court last addressed this issue in the forfeiture context. In *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), the Court held that citizens are constitutionally entitled to an informal hearing that precedes the seizure of their homes for potential forfeiture. *Id.* at 62. A pretrial hearing avoids the harm that results from delay between a preliminary deprivation – be it by seizure or restraining order – and trial. Without an interim hearing, the "meaningful time" component of all due process equations goes unsatisfied. "*Barker* does not address this issue. Rather, it asks how long a government may keep open a case before it is fundamentally unfair to allow it to continue. The *Barker* test, therefore, does not apply." *Simms*, 2012 U.S. Dist. LEXIS 93052, at *27.

The risk of erroneous deprivation is particularly elevated in the forfeiture setting because "the Government has a direct and pecuniary interest in the outcome of the proceeding." *Good*, 510 U.S. at 56, citing *Harmelin v. Michigan*, 501 U.S. 957, 979 (1991) (opinion of Scalia, J.) ("It makes sense to scrutinize government action more closely when the State stands to benefit"). As this Court noted in *Good*, in

---

[7] *See, e.g.*, *Connecticut v. Doehr*, 501 U.S. 1 (1991) (prejudgment attachment of real property); *Barry v. Barchi*, 443 U.S. 55 (1979) (horse trainer's license suspension).

1990 the Attorney General distributed a memorandum to all U.S. Attorneys encouraging them "'to significantly increase production'" – *i.e.*, "the volume of forfeitures in order to meet the Department of Justice's annual budget target." *Id.* at 56 n.2 (citation omitted). The result of the Department's efforts has been staggering. In the 22 years from 1989 to 2010, an estimated $12.6 billion in assets was seized by U.S. Attorneys in asset forfeiture cases. *See* Maguire, Kathleen, ed., "Sourcebook of Criminal Justice Statistics," U.S. Department of Justice, Bureau of Justice Statistics (Albany, NY: University of Albany, School of Criminal Justice, Hindelang Criminal Justice Research Center, 2009) Table 4.45.2010, http://www.albany.edu/sourcebook/pdf/t4452010.pdf. In FY 2011, the Department's Asset Forfeiture Fund contained assets of approximately $6.9 billion, an increase of nearly 72% from 2010. *See Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statements*, Fiscal Year 2011, U.S. Dept. of Justice, Office of Inspector General, January 2012, at p. 6. Of that amount, approximately $1.7 billion was added in FY 2011. *Id.* at p. 11. By statute, DOJ uses the forfeited assets to fund is own operations. *Id.* at pp. 4-5, citing 28 U.S.C. § 524(c). Because of these incentives, extra procedures are necessary "to ensure the requisite neutrality that must inform all government decision-making." *Good*, 510 U.S. at 55. *See also Marshall v. Jerrico*, 446 U.S. 238, 250 (1980) (due process would be violated if, in a civil enforcement scheme, there is "a realistic possibility that the [prosecutor's] judgment will be distorted by the prospect of institutional gain as a result of zealous

enforcement efforts."); *United States v. Funds Held ex rel. Wetterer*, 210 F.3d 96, 110 (2d Cir. 2000) (noting the "potential for abuse" and "corrupting incentives" of a system where the Department of Justice "conceives the jurisdiction and ground for seizures, and executes them, [and] also absorbs their proceeds. . . .").

Even before *Mathews* was decided, the Court engaged in a similar balancing test to determine what interim process was due. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972) (pre-judgment seizure of household goods); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (pre-judgment garnishment of bank account); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (pre-judgment attachment); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (license suspension proceedings); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (pre-judgment garnishment of wages).

The majority opinion in *Kaley I* claimed that *Bissell* was somehow consistent with this line of authority, in particular, *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). *See Kaley I*, 579 F.3d at 1257. It plainly is not. The type of hearing this Court approved in *Mitchell* was not limited to "tracing." Upon a buyer's default in paying the balance of the purchase price of various appliances, the creditor obtained ex *parte* a "writ of sequestration" for the recovery of the goods under a Louisiana statute that required only a sworn affidavit and the posting of a bond. After the appliances were seized, the debtor moved to dissolve the writ, arguing that he had a right to a pre-seizure hearing under the Due Process Clause of the

Fourteenth Amendment. This Court upheld the Louisiana statute, holding that the absence of a pre-seizure hearing was ameliorated by the fact that the Louisiana statute provided the debtor, *upon his mere request*, a prompt post-seizure hearing where *the creditor* had to "'prove[ ] the grounds upon which the writ was issued,' the existence of the debt, lien, and delinquency." *Id.* at 606. If the creditor failed to meet this burden, the court could order the return of the property and "assess damages in favor of the debtor, including attorney's fees." *Id.* at 606.[8]

Presumptively innocent criminal defendants, we respectfully submit, are entitled to no less due process where the failure to afford it will deprive them of the use of the assets they need to vindicate their "structural" Sixth Amendment right to counsel of choice. *See United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

E. This Court Granted Certiorari To Decide Whether Property Owners In *Civil* Forfeiture Cases Had A Due Process Right To A Post-Seizure, Pretrial Adversarial Hearing.

Not only are the circuits split on the due process rights of criminal defendants whose assets are

---

[8] The majority and concurring opinions in *Kaley I* erroneously read *Mitchell* as placing the burden of proof on the Kaleys. The *Mitchell* Court considered the party with the burden of proof as the party *seeking to restrain* the assets, not the party seeking *the removal* of the restraints.

restrained *ex parte* for later criminal forfeiture, but the courts are likewise divided on the due process rights of claimants whose assets are restrained in a civil forfeiture case. In *Alvarez v. Smith*, 558 U.S. 87, 130 S.Ct. 576 (2009), this Court

> granted certiorari . . . to determine whether Illinois law provides a sufficiently speedy opportunity for an individual, whose car or cash police have seized without a warrant, to contest the lawfulness of the seizure.

Thus it appeared that this Court would address – in the context of a civil case not implicating the Sixth Amendment – the framework for analyzing whether the Due Process Clause requires an interim hearing before a civil forfeiture trial. As the Solicitor General of the United States framed the issue in its amicus brief in *Alvarez*:

> Whether courts should apply the "speedy trial" test employed in *United States v. $8,850 in U.S. Currency*, 461 U.S. 555 (1983), and *Barker v. Wingo*, 407 U.S. 514 (1972), or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), in determining whether the Due Process Clause requires a state or local government to provide owners of property seized for civil forfeiture with a post-seizure probable cause hearing before the actual forfeiture proceeding.

2008 U.S. Briefs 351; 2009 U.S. S. Ct. Briefs LEXIS 396. After briefing and argument, however, the issue

became moot, leaving this important constitutional question unanswered. *Alvarez*, 130 S.Ct. at 578.

Alvarez had sought certiorari review of *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008), in which the Seventh Circuit had applied *Mathews*, not *$8,850*, to conclude that due process required some sort of pre-forfeiture mechanism to test the validity of retaining an owner's property. The Seventh Circuit cited with approval the Second Circuit's opinion, authored by then-Judge Sotomayor, in *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002).

Krimstock considered New York City forfeiture statutes which allowed the police to seize vehicles driven by defendants arrested for drunk driving. Although the statutes required the City to initiate civil forfeiture proceedings within 25 days, the proceedings were commonly stayed until the criminal cases concluded. *Id.* at 45. This resulted in a situation where the forfeiture proceedings generally took "months or even years to be finalized." *Id.* at 44. Relying on *$8,850* and *United States v. Von Neumann,* 474 U.S. 242 (1986), the district court held that due process did not require interim probable cause hearings prior to the forfeiture trials. The Second Circuit, however, reversed and, consistent with its parallel ruling in *Monsanto IV*, held that probable cause hearings were required in addition to forfeiture proceedings. In so ruling, the Second Circuit distinguished *$8,850* and *Von Neumann* as cases where the claimants sought the complete *dismissal* of all forfeiture proceedings based on the delay in providing the

ultimate forfeiture trials, recognizing that the Constitution "distinguishes between the need for prompt review of the propriety of continued government custody, on the one hand, and delays in rendering final judgment, on the other." *Id.* at 68. Accordingly, the Second Circuit applied *Mathews* in concluding that a prompt post-seizure hearing was constitutionally required. *Accord Coleman v. Watt*, 40 F.3d 255, 260 (8th Cir. 1994); *United States v. Simms*, No. 12-701 (EGS), 2012 U.S. Dist. LEXIS 93052 (D. D.C. July 6, 2012).

The Illinois Supreme Court, in a case decided after *Alvarez* was dismissed as moot, decided that under *$8,850* and *Von Neumann*, no prompt probable cause hearing is required after the seizure of a vehicle, claiming that *Krimstock* was "wrongly decided" and that the Seventh Circuit's opinion in *Smith* was equally "flawed." *People v. One 1998 GMC*, 960 N.E.2d 1071, 1082, 1085, 355 Ill. Dec. 900, 2011 IL 110236 (Ill. 2011), *cert. denied*, 130 S.Ct. 2718 (2012).[9]

Thus, the debate rages on over whether a ***civil*** claimant is entitled to a post-seizure, interim hearing and concomitant interim relief. Of note, the Solicitor General in its amicus brief in *Alvarez* made the observation that:

---

[9] We assume that the Court declined to review *One 1998 GMC* due to mootness concerns. *See One 1998 GMC*, 960 N.E.2d at 1103 (Karmeier, J., concurring) (noting that the issue "has become a moot point" due to a statute, effective Jan. 1, 2012, authorizing "the type of postseizure hearing demanded in this case").

> Regardless whether the due process question is analyzed under the general rubric of *Mathews v. Eldridge,* 424 U.S. 319 (1976), or under the forfeiture-specific analysis of *$8,850,* a statute that provides for a forfeiture hearing within a reasonable time limit is facially constitutional. ***When, on the facts of a particular case, an individual claimant faces genuine hardship from delay, she may be entitled, under $8,850, to additional redress.*** But respondents have disclaimed any ability to make such an individualized showing in this case. The Illinois forfeiture statute is facially valid, and the Constitution does not require that it be supplemented with the additional ***preliminary procedure*** that the court of appeals imposed.

2008 U.S. Briefs 351 at p. 7; 2009 U.S. S. Ct. Briefs LEXIS 396 at pp. 13-14 (emphasis added). Although we disagree with the Solicitor General's view that *$8,850* (and *Barker*) provide the proper framework, it is significant that the Solicitor General recognizes that, in particular cases, due process may require some "additional redress," presumably through a "preliminary procedure."

Unlike a civil forfeiture case in which the only issue at the ultimate trial is the forfeitability of the assets seized, in a criminal case, so much more is at issue and so much more is at stake. A criminal defendant may be accused of multiple charges, some of which form the predicate for the restraint and

forfeiture of assets, while others do not. The consequences of losing at a criminal trial are likely to be far more serious than just the loss of property rights.[10]

With so much at stake, due process requires a "preliminary procedure" to provide interim "redress" from the *ex parte* restraint of assets, where the "genuine hardship" facing a claimant/defendant is the denial of her Sixth Amendment right to counsel of choice at trial. For without such a pretrial hearing – at which the defendant is prepared to demonstrate that the prosecution's theory of forfeiture is misguided and thus the restraint of assets is unjustified – she cannot hire her chosen counsel to mount the most aggressive defense at trial against the charges that threaten to strip her of those assets, as well as incarcerate her for those and other charges alleged in the indictment.

---

[10] Here, the Kaleys are also charged with obstruction of justice, which does *not* authorize the restraint or forfeiture of their assets. Even if they are acquitted of the stolen property and money laundering counts used to obtain the restraining order, they may be unfairly convicted of the obstruction count having been denied counsel of choice.

CONCLUSION

Every circuit but one has ruled on the due process issues this Court reserved in *Monsanto*.[11] This case presents the appropriate opportunity for the Court to resolve the intractable circuit split that has developed. The circuits are in disagreement over the proper analytical framework for addressing the due process issues (*Mathews* versus *Barker/$8,850*); whether a post-restraint hearing may address the weaknesses in the government's underlying case or merely "tracing" issues; whether the standard of proof is "probable cause" or the "likelihood" of conviction; and whether the government or the defendant bears the burden of proof.

The Court should grant the petition for a writ of certiorari and reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

HOWARD SREBNICK
Counsel of Record
BLACK, SREBNICK, KORNSPAN & STUMPF, P.A.
201 South Biscayne Blvd., Suite 1300
Miami, FL 33131
(305) 371-6421
HSrebnick@RoyBlack.com

G. RICHARD STRAFER
G. RICHARD STRAFER, P.A.
201 South Biscayne Blvd., Suite 1380
Miami, FL 33131
(305) 374-9091
StraferPA@aol.com

Counsel for Petitioners

---

[11] Only the First Circuit has not spoken. *See United States v. Real Property in Waterboro*, 64 F.3d 752, 757 (1st Cir. 1995) (reserving issue).

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-15048

D.C. Docket No. 9:07-cr-80021-KAM-1

UNITED STATES
OF AMERICA,

Plaintiff-Appellee,

versus

KERRI L. KALEY,
BRIAN P. KALEY,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(April 26, 2012)

Before EDMONDSON and MARCUS, Circuit Judges, and FAWSETT,* District Judge.

---

* Honorable Patricia C. Fawsett, United States District Judge for the Middle District of Florida, sitting by designation.

MARCUS, Circuit Judge:

In this interlocutory criminal appeal, Kerri L. Kaley and Brian P. Kaley challenge a district court's order denying their motion to vacate a pretrial protective order restraining their assets. This is the second time the case has come before us. In *United States v. Kaley*, 579 F.3d 1246 (11th Cir. 2009) ("*Kaley I*"), we reversed the district court's prior order which had concluded that the Kaleys were not entitled to a pretrial evidentiary hearing on their motion to vacate the protective order, and we remanded for further proceedings. On round two, the district court determined that the Kaleys were entitled to a pretrial, post-restraint hearing, but that the only question to be addressed at the hearing was whether the restrained assets were traceable to or involved in the conduct charged in the indictment. At the hearing, the Kaleys did not present any evidence regarding traceability, and the district court declined to set aside the protective order.

The Kaleys once again appeal, arguing that, in addition to traceability, they should have been allowed to challenge the factual foundation supporting the grand jury's probable cause determinations (the very validity of the underlying indictment) at a pretrial, post-restraint hearing. Because, as we see it, the defendants are not entitled to try the entire case twice, once before trial and then again before a judge and jury, we affirm the district court's order denying the Kaleys' motion to vacate the protective order.

I.

In *Kaley I,* we summarized the basic facts and procedural history of the case in this way:

> In January 2005, Kerri Kaley, then a sales representative with Ethicon Endo-Surgery, was informed she was the target of a grand jury investigation in the Southern District of Florida. Kaley was suspected of stealing prescription medical devices ("PMDs") from hospitals and then selling them on the black market. Kaley retained . . . counsel in the investigation. Kaley's husband, Brian Kaley, who was also under investigation . . . retained a separate attorney. . . . Together, the two attorneys informed the Kaleys that their legal fees to take the case through trial would be approximately $500,000. To obtain funds to pay those fees, the Kaleys applied for and obtained a home equity line of credit of $500,000 on their residence and used the proceeds to buy a certificate of deposit ("CD").
>
> On February 6, 2007, the grand jury returned a seven-count indictment against the Kaleys.[FN1] Count One charged a conspiracy to transport PMDs in interstate commerce while knowing them to have been stolen, in violation of 18 U.S.C. § 371. Counts Two through Six charged five substantive [18 U.S.C.] § 2314 offenses, and Count Seven charged obstruction of justice, in violation of 18 U.S.C. § 1512(b)(3). The indictment also sought criminal forfeiture of all property

traceable to the § 2314 offenses, including the CD. . . .

FN1: The indictment was also returned against Jennifer Gruenstrass, whose case has since been severed from the Kaleys'.

On February 7, 2007, the Government moved the district court *ex parte* for a protective order restraining the Kaleys from transferring or otherwise disposing of the property listed in the forfeiture count, and a magistrate judge, concluding that the indictment established probable cause that the property was "traceable to" the Kaleys' commission of the § 2314 offenses, granted the motion the same day. . . .

On March 5, 2007, the Kaleys moved the district court to vacate the February 7th protective order. They contended that the order prevented them from retaining counsel of their choice in violation of their Sixth Amendment right to the representation of counsel. A magistrate judge heard this motion too on April 6th and sustained the protective order; however, he limited the protective order's scope (insofar as it applied to the CD) to $140,000.

On April 10, 2007, the grand jury returned a superseding indictment. This indictment replicated the first seven counts of the first indictment and added an additional count – a charge that the Kaleys had conspired to launder the proceeds of the § 2314 offenses, in violation of 18 U.S.C. § 1956(h).

This indictment also sought the criminal forfeiture of the CD and the Kaleys' residence on the theory that those assets were "involved in" the Kaleys' commission of the § 1956(h) offense. On April 17th, the Kaleys renewed their motion to vacate the February 7th protective order (as amended by the order of April 6th), and expressly requested a pretrial, post-restraint evidentiary hearing.

The magistrate judge heard the motion on April 27th. He questioned whether the indictment alone provided probable cause to restrain the defendants' assets and ordered the prosecutor to submit an affidavit supporting probable cause. The prosecutor responded by filing, in secret and under seal, an affidavit executed by the FBI case agent.

On May 1, 2007, the magistrate judge issued two orders. In the first order, he found probable cause – based on the indictment and the case agent's affidavit – that the CD and the Kaleys' residence were "involved in" the violations of § 1956(h) and § 2314. In the second order, he amended the February 7th protective order to include within its scope the full value of the CD and the Kaleys' residence. On May 2nd, the magistrate judge issued a third order denying the Kaleys' motion to vacate the protective order and to hold a pretrial, post-restraint evidentiary hearing. . . .

On May 7, 2007, the Kaleys appealed the magistrate judge's May 1st and 2nd

> orders to the district court. On June 25th, the district court affirmed the magistrate judge's issuance of the protective order. . . . The trial court also affirmed the magistrate judge's denial of a pretrial evidentiary hearing, concluding that postponing the hearing until the trial itself satisfied due process. On June 27, 2007, the Kaleys lodged [an] interlocutory appeal, challenging the district court's decision.

Kaley I, 579 F.3d at 1249-53 (footnotes omitted).

In *Kaley I*, this Court reversed the district court's denial of the Kaleys' request for an evidentiary hearing and remanded for further proceedings. We held that under controlling case precedent the district court was correct to apply the four factors enumerated in *United States v. Bissell*, 866 F.2d 1343 (11th Cir. 1989), to determine whether a pretrial, post-restraint hearing was required, but that the district court had erred in weighing those factors. *Kaley I*, 579 F.3d at 1256-57. We remanded the case for the district court to reweigh the *Bissell* factors in light of our ruling. *Id.* at 1260. On remand, the district court found that the *Bissell* factors favored holding an evidentiary hearing.

In pre-hearing memoranda, the Kaleys argued that the question for the district court to consider at the hearing was whether the government would be likely to prevail at trial. They asserted that the government would be unlikely to prevail because the theory underlying its prosecution was baseless and

the underlying facts could not support the charges. The Kaleys explained that they were accused of receiving unwanted prescription medical devices ("PMDs") from hospitals that previously had purchased them from Ethicon, Kerri Kaley's employer, and then reselling those PMDs themselves rather than returning them to Ethicon. According to the Kaleys, the government's theory of prosecution was that Kerri Kaley held the returned PMDs in a "constructive trust" for Ethicon, and so, by selling the PMDs, the Kaleys unlawfully converted Ethicon's property. The Kaleys contended that there could be no constructive trust because they did not owe any fiduciary duties to Ethicon, and because Ethicon had never asserted any property rights in the unwanted PMDs. The Kaleys also noted that the government had offered this constructive trust theory at the separate trial of a codefendant, Jennifer Gruenstrass, who was acquitted of all charges, and they asserted that this Court had rejected a similar theory of prosecution in *United States v. Goodrich,* 871 F.2d 1011 (11th Cir. 1989).

At an evidentiary hearing conducted on July 29, 2010, the district court heard arguments from the parties regarding the hearing's proper scope. The Kaleys explained that they were not contesting whether the restrained assets were traceable to or involved in the conduct charged in the indictment, but instead were taking the position that the protective order should be vacated because the underlying facts did not support the charged crimes in the first place. The government responded that, in light of this Court's

decisions in *Bissell* and *Kaley I*, it was not required to offer substantive evidence from its case against the Kaleys in order to establish the evidentiary foundation of the criminal charges, and that the only purpose of the hearing was to determine whether the restrained assets were traceable to or involved in the conduct charged in the indictment.[1]

On October 24, 2010, the district court issued an order denying the Kaleys' motion to vacate the protective order. Citing language taken from *Bissell* and *Kaley I*, the district court concluded that the only relevant inquiry at the hearing was whether the restrained assets were traceable to or involved in the alleged criminal conduct. Because the Kaleys did not attempt to challenge traceability in any way – arguing only that the government's underlying case had no merit – the district court denied their motion to vacate the protective order. On October 27, 2010, the Kaleys lodged this second interlocutory appeal from the district court's order.

II.

In *Bissell*, a panel of this Court laid out the factors that courts must weigh in determining whether an indicted defendant whose assets have been restrained

---

[1] The Kaleys had previously acknowledged that if the district court were to agree with the government, then the district court would have no choice but to uphold the restraints on the Kaleys' assets.

pretrial is entitled to an evidentiary hearing. In *Kaley I,* we determined that the district court erred in weighing the *Bissell* factors. On remand, the district court reweighed the factors and determined that the Kaleys were entitled to a pretrial hearing. We are now called upon to address the nature and scope of that hearing. The district court concluded that the Kaleys could not challenge whether the alleged conduct actually supported the probable cause determination made by the grand jury. We agree.

We begin by emphasizing again that the Sixth Amendment right implicated here – the qualified right to counsel of choice – is a weighty concern. *See, e.g., Powell v. State of Ala.,* 287 U.S. 45, 53 (1932) ("It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."). A pretrial restraining order may make unavailable assets that a criminal defendant needs to pay for his counsel of choice. As we recognized in *Kaley I,* this is a serious consequence for the defendant: "Being effectively shut out by the state from retaining the counsel of one's choice in a serious criminal case is a substantial source of prejudice. . . ." *Kaley I,* 579 F.3d at 1258.[2]

---

[2] The Supreme Court has made clear, however, that the right to counsel of choice does not include the right to use illegitimate, forfeitable assets to pay for counsel. *Caplin & Drysdale v. United States,* 491 U.S. 617, 626-32 (1989). As the Court explained:

(Continued on following page)

Despite this weighty concern, the forfeiture statute at issue, 21 U.S.C. § 853, does not require a hearing for the issuance or continuation of a *post-indictment* restraining order. And the statute makes it abundantly clear that Congress knew how to provide for such a hearing if it had wanted to do so. Section 853(e) authorizes a court to restrain property that would be subject to criminal forfeiture upon conviction. 21 U.S.C. § 853(e). Under subparagraph (1)(B), to obtain such a restraining order *before* the filing of an indictment requires "notice to persons appearing to have an interest in the property and opportunity for a hearing." *Id.* § 853(e)(1)(B). But, in sharp contrast, subparagraph (1)(A), dealing with post-indictment restraining orders, contains no such

---

> A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the Government does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense.

Id. at 626. The more difficult issues are whether due process requires a hearing to maintain a pretrial restraining order on assets alleged but not yet proven to be forfeitable and, if so, what such a hearing would entail. The Supreme Court has not yet addressed these issues. *See United States v. Monsanto*, 491 U.S. 600, 615 & n.10 (1989) (holding that assets can be restrained pretrial "based on a finding of probable cause to believe that the assets are forfeitable," but noting that "[w]e do not consider today, however, whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed").

requirement. *See id.* § 853(e)(1)(A). Rather, it states that the court may enter a restraining order upon the filing of an indictment that alleges that the property would be subject to forfeiture in the event of conviction. *Id.*[3] The difference between these two subparagraphs unambiguously demonstrates that Congress contemplated the issue of a hearing, but decided not to require one post-indictment.[4]

---

[3] Specifically, the statute provides in pertinent part:

> Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section –
>
> (A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section. . . .

21 U.S.C. § 853(e)(1)(A).

[4] The statute also provides for a pre-indictment temporary restraining order without a hearing if certain requirements are met, but it requires that, upon request, a hearing "shall be held at the earliest possible time." 21 U.S.C. § 853(e)(2). Thus, Congress was also aware that it could require a hearing *after* the entry of an ex parte restraining order, but it plainly declined to impose any such requirement for the continuation of post-indictment restraints.

Since the statute itself imposes no hearing requirement, the only pretrial hearing required is one provided under the Due Process Clause. In *Bissell,* this Court held that, when a restraint on the defendant's assets prevents him from retaining counsel of choice, due process requires a pretrial hearing if the four-factor balancing test enunciated in *Barker v. Wingo,* 407 U.S. 514, (1972), weighs in favor of a hearing. *Bissell,* 866 F.2d at 1353. The four *Bissell/Barker* factors are: "(1) the length of the delay before the defendants received their post-restraint hearing; (2) the reason for the delay; (3) the defendants' assertion of the right to such a hearing pretrial; and (4) the prejudice the defendants suffered due to the delay weighed against the strength of the United States's interest in the subject property." *Kaley I,* 579 F.3d at 1254.

In this case, the Kaleys are entitled to a pretrial hearing under the *Bissell* test, as the district court ultimately concluded after our *Kaley I* remand. The district court found that the first two factors weighed in favor of the government, because the projected delay until trial was short and the government had a substantial interest in not revealing its case before trial.[5] But the third and fourth factors weighed in the Kaleys' favor and were enough to entitle the Kaleys to an evidentiary hearing. As we explained in *Kaley I,*

---

[5] In *Kaley I,* we held that the district court's determinations on these first two factors did not amount to an abuse of discretion. 579 F.3d at 1256.

the third factor must weigh in the defendants' favor when they "have taken every available step to contest the restraints." *Id.* at 1257-58. And as for the fourth factor, although the government has a strong interest in restraining the property, it is outweighed by the significant prejudice the Kaleys would suffer without a hearing: the potentially wrongful deprivation of the resources needed to retain their counsel of choice. The Kaleys were thus entitled to a pretrial, post-restraint hearing.

The question now before this Court is exactly what the hearing requires. *Kaley I* suggested that the defendants cannot challenge the underlying indictment itself. *Kaley I*'s holding that the district court had incorrectly applied the *Bissell* test was based on the district court's error in evaluating the third factor – the defendants' assertion of the right to a pretrial hearing. We explained:

> [I]n evaluating the third factor, the district court concluded that, under *Bissell*, once probable cause has been determined, the only way that a defendant can show that assets are not forfeitable is to establish that the crime charged in the indictment did not occur. This, however, was not the holding of *Bissell* and could not have been the opinion's intent, because, as the district court correctly noted, a challenge to the indictment cannot be made pretrial. A pretrial challenge to the indictment would require the district court to hold an evidentiary hearing to determine whether the crime occurred. . . . In many

> cases, such a hearing would go so far as to render the trial on the merits of the criminal charge unnecessary. . . . But the *Bissell* court undeniably contemplated some circumstances in which, despite the presence of probable cause, a pretrial hearing would be required.
>
> The principle of law *Bissell* advances is that, after weighing the four *Barker* factors, the district court *may* grant the defendant's request for a pretrial evidentiary hearing in order to determine whether assets described in the forfeiture count of the indictment were wrongly seized (or placed under the restraint of a protective order). . . . The purpose of the hearing would not be to determine guilt or innocence but, rather, to determine the propriety of the seizure. Moreover, in such a hearing, the defendant, as the movant, would have the burden of proof, and the prosecution would thus be saved from having to preview its entire case.

Id. at 1257-58. *Kaley I* concluded that the district court had erred in its analysis of the third *Bissell* factor because it misconstrued the nature of the hearing to which the Kaleys would be entitled. The district court had assumed that the only way to challenge the restraint was by conducting a global pretrial hearing challenging the factual sufficiency of the underlying indictment. *Kaley I* explained that, although such a challenge is not permissible, a more modest hearing addressing the "propriety of the seizure" would be lawful in an appropriate case. *Id.* at 1257.

Admittedly, because the issue before this Court in *Kaley I* was simply whether the Kaleys were entitled to some kind of hearing, we did not have occasion to discuss the hearing's exact nature and contours. That is the only issue raised by the Kaleys in this second appeal: whether the scope of the hearing is limited to the issue of traceability or instead permits the defendants to challenge both traceability and the grand jury's probable cause determinations for the charged offenses. To the extent that *Kaley I* did not settle the issue, we now hold that at a pretrial, post-restraint hearing required under the *Bissell* test, the petitioner may not challenge the evidentiary support for the underlying charges.

Several reasons counsel for this limitation on the scope of the hearing. In the first place, as we've noted, the statute itself does not provide for a hearing, and to the extent that Congress contemplated a hearing, it determined that a defendant should not be allowed to challenge the indictment itself. The legislative history surrounding the codification of [21] U.S.C. § 853(e) couldn't be clearer or more unambiguous on the point:

> Paragraph (1)(A) provides that a restraining order may issue "upon the filing of an indictment or information charging a violation . . . and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section." Thus, the probable cause established in the indictment or information is, in itself, to be a sufficient basis for issuance of a restraining order. While the

> court may consider factors bearing on the reasonableness of the order sought, it is not to "look behind" the indictment or require the government to produce additional evidence regarding the merits of the case. . . .
>
> In contrast to the pre-indictment restraining order authority set out in paragraph (1)(B), the post-indictment restraining order provision does not require prior notice and opportunity for a hearing. . . . This provision does not exclude, however, the authority to hold a hearing subsequent to the initial entry of the order and the court may at that time modify the order or vacate an order that was clearly improper (e.g., where information presented at the hearing shows that the property restrained was not among the property named in the indictment). However, *it is stressed that at such a hearing the court is not to entertain challenges to the validity of the indictment.* For the purposes of issuing a restraining order, the probable cause established in the indictment or information is to be determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based.

S. Rep. No. 98-225, at 168-69 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3385-86 (emphasis added). It is not too much to say that allowing a challenge to the factual underpinnings of the underlying charges at a pretrial, post-restraint hearing would be at war with this legislative history.

Moreover, this kind of pretrial challenge to the evidence supporting an indictment would be wholly inconsistent with the Supreme Court's repeated pronouncements in *Costello v. United States,* 350 U.S. 359 (1956), and its progeny. In these cases, the Court has shown a profound reluctance to allow pretrial challenges to a grand jury's probable cause determination. As the Court observed in *Costello*: "An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." *Id.* at 363. This holding has been repeatedly reaffirmed. *See United States v. Williams,* 504 U.S. 36, 54-55 (1992) ("Our words in *Costello* bear repeating: Review of facially valid indictments on [the] grounds [of inadequate evidence] 'would run counter to the whole history of the grand jury institution, and neither justice nor the concept of a fair trial requires it.'" (alterations omitted) (quoting *Costello,* 350 U.S. at 364)); *Bank of Nova Scotia v. United States,* 487 U.S. 250, 261 (1988) (explaining that a facially valid indictment is not subject to "a challenge to the reliability or competence of the evidence presented to the grand jury," because "a court may not look behind the indictment to determine if the evidence upon which it was based is sufficient"); *United States v. Calandra,* 414 U.S. 338, 344-45 (1974) ("[T]he validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. . . ."); *Lawn v.*

United States, 355 U.S. 339, 349 (1958) ("[An] indictment returned by a legally constituted nonbiased grand jury, . . . if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment.").

In *Costello,* the defendant sought to challenge his facially valid indictment because it was not supported by competent evidence, inasmuch as the only evidence presented to the grand jury was in the form of hearsay. *Costello,* 350 U.S. at 361. The Supreme Court refused to allow the challenge. The Court observed that a rule allowing defendants to challenge indictments on the basis of inadequate or incompetent evidence "would run counter to the whole history of the grand jury institution," and "would result in interminable delay but add nothing to the assurance of a fair trial." *Id.* at 364. Under such a rule, "a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury," but, as the Court explained, "[t]his is not required by the Fifth Amendment." *Id.* at 363.

Subsequent case law clearly establishes that an otherwise valid indictment may not be invalidated even if the grand jury has considered evidence obtained in violation of a defendant's constitutional rights. *Calandra,* 414 U.S. at 351-52; *Lawn,* 355 U.S. at 349 (noting that a facially valid indictment is not subject to challenge on the ground that the grand jury relied on evidence obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination).

In *Calandra,* the Supreme Court declined to extend the exclusionary rule to grand jury proceedings. 414 U.S. at 351-52. Thus, the grand jury's consideration of evidence obtained in violation of the Fourth Amendment does not invalidate an otherwise facially sufficient indictment. After discussing the historic role of the grand jury and its responsibility to make the probable cause determination, *id.* at 342-43, the Court reasoned that applying the exclusionary rule would "seriously impede" the role of the grand jury by "delay[ing] and disrupt[ing] grand jury proceedings," *id.* at 349. The Court explained that it was "disinclin[ed] to allow litigious interference with grand jury proceedings," observing that application of the exclusionary rule would "effectively transform[ ] them into preliminary trials on the merits." *Id.* at 350.

Similarly, the Court has held that an indictment cannot be invalidated based on the government's failure to present known exculpatory evidence to the grand jury. *Williams,* 504 U.S. at 55. In *Williams,* the district court had dismissed the indictment, reasoning that the withheld exculpatory evidence "created a reasonable doubt about [the defendant's] guilt" and "thus rendered the grand jury's decision to indict gravely suspect." *Id.* at 39 (alterations and internal quotation marks omitted). But the Supreme Court squarely rejected this kind of "[j]udicial supervision of the quantity and quality of the evidence relied upon by the grand jury." *Id.* at 51. Since courts must "abstain from reviewing the evidentiary support for the grand jury's judgment" under *Costello* and its

progeny, the Court reasoned that "[i]t would make little sense" to require courts to "scrutiniz[e] the sufficiency of the prosecutor's presentation." *Id.* at 54. Thus, so long as the grand jury finds that there is probable cause, the prosecutor's failure to present even "substantial" exculpatory evidence does not invalidate the indictment. *See id.* at 39.

Underlying all of these cases is the Supreme Court's recognition of the unique nature of the grand jury as an independent body, not an arm of the prosecution. *See, e.g., Calandra,* 414 U.S. at 343 (noting the grand jury's responsibility to protect citizens against "arbitrary and oppressive governmental action" in the form of "unfounded criminal prosecutions"); *Costello,* 350 U.S. at 362 (summarizing the historical independence of the grand jury). In *Williams,* the Court explained that the grand jury "belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people." *Williams,* 504 U.S. at 47. As the Court had previously explained, the grand jury "serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Branzburg v. Hayes,* 408 U.S. 665, 687 n.23 (1972) (alteration in original) (quoting *Wood v. Georgia,* 370 U.S. 375, 390 (1962)) (internal quotation marks omitted). Indeed, "[t]he very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a

group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone v. United States*, 361 U.S. 212, 218 (1960).

In light of the important historical role of the grand jury as an independent accusatory body, *Costello* and its progeny evince a powerful reluctance to allow pretrial challenges to the *evidentiary* support for an indictment. Of course, a defendant may challenge an indictment on a variety of other grounds, including failure to state an offense, lack of jurisdiction, double jeopardy, improper composition of the grand jury, and certain types of prosecutorial misconduct. *See* Fed. R. Crim. P. 6(b) (allowing a defendant to move to dismiss the indictment on the basis that the grand jury "was not lawfully drawn, summoned, or selected," or that an individual juror was not legally qualified); Fed. R. Crim. P. 12(b)(3)(B) (allowing a defendant to challenge an indictment for "fail[ure] to invoke the court's jurisdiction or to state an offense"); *Bank of Nova Scotia*, 487 U.S. at 257 (noting prior cases holding that racial or gender discrimination in the selection of grand jurors requires dismissal of the indictment); *id.* at 255-56 (holding that a district court may dismiss an indictment based on prosecutorial misconduct, but only if the defendant can show prejudice); *United States v. Salman*, 378 F.3d 1266, 1267 n.3 (11th Cir. 2004) (recognizing that "a district court may dismiss an indictment . . . when immunity, double jeopardy, or jurisdictional issues are implicated").

But under this long line of case authority, a defendant cannot challenge whether there is a sufficient

evidentiary foundation to support the grand jury's probable cause determination. Yet that is exactly what the Kaleys propose to do at a pretrial hearing, laying out an elaborate theory that they cannot be charged with transporting stolen goods in interstate commerce because the goods (the prescription medical devices) were not stolen in the first place. In support of this claim, the Kaleys sought to introduce various pieces of evidence apparently never heard by the grand jury in an effort to convince the district court that the government could not prove that the Kaleys had committed the charged offenses.[6] In that sense, the Kaleys sought to do precisely what the Supreme Court prohibited in *Williams*: adduce additional evidence not presented to the grand jury in order to show that it would be unreasonable to find probable cause. In other words, the Kaleys presumably would have the district court consider all of the new evidence they had offered at their hearing and weigh it together with either the evidence previously presented to the grand jury or whatever evidence the prosecutor presented at the hearing, in order to determine whether there was probable cause to support the charges. In *Williams,* the Court rejected this kind of pretrial direct assault on the indictment. We, too,

---

[6] For the hearing, the Kaleys sought to introduce into evidence: policy manuals and other materials from Ethicon; a bill of particulars filed by the government in the Gruenstrass case; transcripts of the Gruenstrass trial; and the transcript of the sentencing hearing of Frank Tarsia, another alleged coconspirator.

decline the defendants' invitation to lodge such a challenge to the grand jury's probable cause determination at a post-restraint due process hearing.

This case does fairly raise a Sixth Amendment issue, but we decline to resolve it in the manner proposed by the Kaleys. Due process does not require that a defendant be allowed to challenge at a pretrial, post-restraint hearing whether there is probable cause to believe that he committed the underlying offenses. This kind of challenge would require the district court to review the grand jury's probable cause determination, undermining the grand jury system and contravening the Supreme Court's repeated observation that a facially valid indictment "is enough to call for trial of the charge on the merits." *Costello*, 350 U.S. at 363.[7] In the face of the Supreme Court's

---

[7] It is true that a prosecutor could theoretically still proceed to trial even after a defendant successfully challenged the restraint on his assets by attacking the sufficiency of the evidence purporting to show that he committed the crime for which forfeiture is sought. A successful challenge at the post-restraint hearing would lead only to the removal of the restraint, not to the dismissal of the indictment itself. But in practice, if the defendant has successfully challenged the restraint by undermining the evidentiary support for the indictment, it is quite unlikely that the prosecutor would proceed to trial. In some cases, the prosecution might have additional evidence to present at trial – if, for instance, it decided not to disclose crucial evidence at the pretrial, post-restraint hearing. But if the government has disclosed the guts of its case, it is hard to see how the prosecutor could proceed to trial after the district judge has already determined that there is insufficient evidence to support the underlying charges. In fact, proceeding to trial under such

(Continued on following page)

repeated admonitions against allowing pretrial challenges to the evidence supporting a facially valid indictment, the congressional design of the statute, and the undeniable fact that a defendant may still fully confront the evidentiary support for the charge at trial, we conclude that a defendant who is entitled to a pretrial due process hearing with respect to restrained assets may challenge the nexus between those assets and the charged crime, but not the sufficiency of the evidence supporting the underlying charge. *Accord United States v. Jones,* 160 F.3d 641, 648 (10th Cir. 1998) ("The district court must take those allegations of the indictment as true and assume at the [pretrial, post-restraint] hearing that the underlying offense has been committed.").

It's worth emphasizing that the prosecution cannot unilaterally restrain a defendant's assets between the time of indictment and trial. In the first place, a prosecutor may seek a pretrial restraint only because Congress has specifically authorized the government to proceed in this manner. *See* 21 U.S.C. § 853(e). To

---

circumstances might implicate ethical constraints imposed on the prosecutor. *See, e.g., Town of Newton v. Rumery,* 480 U.S. 386, 409 (1987) (Stevens, J., dissenting) (noting that a prosecutor "is ethically obligated . . . to drop charges when he believes that probable cause as established by the available, admissible evidence is lacking"); *see also* Ala. Rules of Prof'l Conduct, Rule 3.8(1)(a) ("The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. . . ."); Fla. Rules of Prof'l Conduct, Rule 4-3.8(a) (same); Ga. Rules of Prof'l Conduct, Rule 3.8(a) (same).

effect a pretrial restraint, the prosecution must obtain a restraining order from a court. *Id.* § 853(e)(1). And the restraining order will issue only if a lawfully constituted grand jury has found probable cause that the assets would be subject to forfeiture upon conviction. *Id.* § 853(e)(1)(A). Without the grand jury's probable cause determination *and* the court's approval, the prosecution is not free to restrain anything.

It's also worth remembering that a defendant whose assets have been restrained will ultimately receive a thorough hearing – the trial itself – that goes to the merits of the underlying charge. And at that trial, the defendant will have counsel (appointed, if necessary), and the right to confront and cross examine witnesses, and to present evidence and call witnesses in his own defense. The question is simply whether the Due Process Clause requires that the defendant get *two* such hearings. We conclude that the answer is no. To rule otherwise would effectively require the district court to try the case twice. *See Kaley I,* 579 F.3d at 1257 ("A pretrial challenge to the indictment would require the district court to hold an evidentiary hearing to determine whether the crime occurred. . . . In many cases, such a hearing would go so far as to render the trial on the merits of the criminal charge unnecessary."). Again, at their post-restraint hearing, the Kaleys sought to argue that their actions did not constitute a crime because Ethicon did not have any ownership interest in the allegedly converted PMDs. This very fact-specific inquiry would amount to a mini-trial on the merits. But

this is precisely the kind of mini-trial that concerned the Supreme Court in *Costello* and *Calandra*. *See Calandra*, 414 U.S. at 350 (explaining that to apply the exclusionary rule in grand jury proceedings would "effectively transform[ ] them into preliminary trials on the merits," and that "[i]n some cases the delay might be fatal to the enforcement of the criminal law"); *Costello*, 350 U.S. at 363 (noting that if the Court adopted the defendant's proposed rule, "a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury," creating long delays). Simply put, the Kaleys are not entitled to try this case twice – once before trial, and then again in the main act before judge and jury.[8]

We add that allowing a defendant to convert a post-restraint hearing into a mini-trial on the merits would often interfere with the real interest expressly recognized by Congress in the pretrial preservation of assets. The legislative history surrounding the statute reveals that 21 U.S.C. § 853(e) was intended to

---

[8] The Kaleys' proposed rule would also lead to an anomalous result: defendants with assets that the government seeks to restrain would get a chance to attack the validity of the indictment before trial, but defendants without such assets would not, no matter how severe the potential implications for their liberty interests. It would be odd indeed to conclude that a charge supported by a grand jury's probable cause determination requires additional proof at a collateral hearing when assets are restrained, but that a defendant without any assets gets no opportunity for a similar sneak preview of the government's case, even if he faces capital charges.

avoid just such a result. As the Senate Report explained:

> Although current law does authorize the issuance of restraining orders in the post-indictment period, neither . . . statute articulates any standard for the issuance of these orders. Certain recent court decisions have required the government to meet essentially the same stringent standard that applies to the issuance of temporary restraining orders in the context of civil litigation. . . . In effect, such decisions allow the courts to entertain challenges to the validity of the indictment, and require the government to prove the merits of the underlying criminal case and forfeiture counts and put on its witnesses well in advance of trial in order to obtain an order restraining the defendant's transfer of property alleged to be forfeitable in the indictment. Meeting such requirements can make obtaining a restraining order – the sole means available to the government to assure the availability of assets after conviction – quite difficult. In addition, these requirements may make pursuing a restraining order inadvisable from the prosecutor's point of view because of the potential for damaging premature disclosure of the government's case and trial strategy and for jeopardizing the safety of witnesses and victims . . who would be required to testify at the restraining order hearing.

S. Rep. No. 98-225, at 162, 1984 U.S.C.C.A.N. at 3378-79 (footnote omitted). This legislative history is

persuasive. *Cf. United States v. Moya-Gomez,* 860 F.2d 706, 729 (7th Cir. 1988) (quoting this same passage and noting that "[t]hese considerations, the product of a careful and deliberate judgment of Congress[,] . . . require our careful and respectful acceptance"); *United States v. Monsanto,* 924 F.2d 1186, 1206 (2d Cir. 1991) (en banc) (Cardamone, J., dissenting) ("The prosecution's ability to prepare its case without being forced to 'tip its hand' prematurely was of paramount importance to the drafters and provides a persuasive reason for delaying a full adversarial hearing on the merits of the government's case during the post-restraint, pretrial period.").

At least one of our sister circuits, however, has concluded that allowing such a challenge imposes no real burden on the government, because the United States may always choose to forgo the pretrial restraint. The Second Circuit has suggested that "the hearing . . . is not being forced upon the government," and that "[i]f the government determines in any case that an adversary hearing in advance of a criminal trial is inadvisable, it always has the option of forgoing the restraint and obtaining forfeiture after conviction." *Monsanto,* 924 F.2d at 1198 (majority opinion). But this does not resolve the issue. Rather, it just shapes the dilemma the government would face.

To force the United States to choose between prematurely revealing its evidence in support of charges a grand jury has already found by probable cause and forgoing altogether a congressionally created right to

seek a pretrial restraint would impose a powerful burden on its interest – a burden neither imposed nor intended by Congress. In fact, Congress provided for pretrial restraints on forfeitable assets precisely because postconviction forfeiture alone was thought to be inadequate. As the legislative history surrounding the codification of 21 U.S.C. § 853(e) explains, criminal forfeiture is important because it can remove the economic incentives for crime and strip criminals of their ill-gotten gains. S. Rep. No. 98-225, at 158, 1984 U.S.C.C.A.N. at 3374. But, as the Senate Report observed, defendants can easily "defeat[ ] forfeiture by removing, transferring, or concealing their assets prior to conviction." *Id.* at 162, 1984 U.S.C.C.A.N. at 3378. Thus, Congress concluded that pretrial restraining orders may be necessary "to guard against [the] improper disposition of forfeitable assets." *Id.* at 160, 1984 U.S.C.C.A.N. at 3377; *see also id.* at 162, 1984 U.S.C.C.A.N. at 3378 (explaining that, without a pretrial restraining order, a defendant subject to postconviction forfeiture "has not only an obvious incentive, but also ample opportunity, to transfer his assets or remove them from the jurisdiction of the court prior to trial").

By our count, at least three of our sister circuits have reached the same conclusion we reach. The Tenth, Sixth, and Seventh Circuits have all held that a defendant at a pretrial, post-restraint hearing may challenge only the connection between the restrained assets and the alleged criminal activity. *Jones*, 160 F.3d at 647-48 (holding that due process requires a pretrial hearing at which "the government must

establish probable cause to believe that the restrained assets are traceable to the underlying offense," but need not "reestablish probable cause to believe that [the] defendants are guilty of the underlying . . . offense"); *United States v. Jamieson*, 427 F.3d 394, 406-07 (6th Cir. 2005) (determining that the district court did not err in applying the *Jones* framework); *Moya-Gomez*, 860 F.2d at 728-31 (requiring a post-restraint hearing "at which the government is required to prove the likelihood that the restrained assets are subject to forfeiture," but holding, based on the legislative history, that "the court may not inquire as to the validity of the indictment and must accept that 'the probable cause established in the indictment or information is . . . determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based' "). As the Tenth Circuit explained, allowing a defendant at a pretrial, post-restraint hearing to challenge the grand jury's probable cause finding for the underlying offense would "do[ ] more damage than necessary to section 853(e)(1)(A) and the role of the grand jury." *Jones*, 160 F.3d at 648 (citing *Costello*, 350 U.S. at 363-64).[9]

---

[9] The Third and Eighth Circuits have held otherwise, concluding that a court must hold a full hearing at which "the government must demonstrate that it is likely to convince a jury, beyond a reasonable doubt, . . . that the defendant is guilty of [the statutory violation] and . . that the profits or properties at issue are subject to forfeiture." *United States v. Long*, 654 F.2d 911, 915 (3d Cir. 1981); *United States v. Lewis*, 759 F.2d 1316, 1324 (8th Cir. 1985) (following *Long*). However, these cases involve an old pretrial restraint provision, which was replaced

(Continued on following page)

In short, the Kaleys' motion to vacate the protective order on their assets was properly denied. We agree with the district court that a defendant may not challenge the evidentiary support for the underlying charge at a hearing to determine the propriety of a post-indictment pretrial restraining order. Having declined to present any evidence about whether the restrained assets were traceable to or involved in the charged conduct, the Kaleys failed to show that the restraint on their assets was improper.

AFFIRMED.

---

by 21 U.S.C. § 853(e). *See* Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, §§ 303, 305, 98 Stat. 2040, 2044-50 (1984) (adding 21 U.S.C. § 853 and striking out what had been subsection (d) of 21 U.S.C. § 848). It is unclear whether the Third and Eighth Circuits would impose the same standard today, especially given that the Supreme Court has since held that pretrial restraints can be based on a finding of probable cause. *See Monsanto*, 491 U.S. at 615. Indeed, the Third Circuit, albeit in an unpublished opinion, has more recently adopted the Tenth Circuit's analysis in *Jones*, concluding that "[t]he post-restraint inquiry at the adversarial hearing is limited to the traceability of the restrained assets, and, thus, the government need not reestablish probable cause to believe that defendants are guilty of the underlying offense." *United States v. Yusuf*, 199 F. App'x 127, 132-33 (3d Cir. 2006) (citing *Jones*, 160 F.3d at 648).

The D.C. and Ninth Circuits, like the Second Circuit in *Monsanto*, have held that the post-restraint hearing must address whether there is probable cause to believe that the defendant is guilty of the crime that makes the assets forfeitable. *United States v. E-Gold, Ltd.*, 521 F.3d 411, 419 (D.C. Cir. 2008); *United States v. Roth*, 912 F.2d 1131, 1134 (9th Cir. 1990).

EDMONDSON, Circuit Judge, concurring in the result:

I concur in today's result. I concur because I cannot say with strong confidence that my colleagues on the panel are incorrect in the way they see the law working. But I concur with deep doubts. And if I were deciding the case alone, I expect I would reach a different result and write something largely in line with *United States v. Monsanto,* 924 F.2d 1186 (2d Cir. 1991) (en banc), and *United States v. E-Gold, Ltd.*, 521 F.3d 411 (D.C. Cir. 2008).

In a case like this one, the use of a pretrial restraining order to freeze a defendant's property is an entirely discretionary function, dependent on a decision initially made by the Executive Branch's prosecutors. Congress has not commanded that such restraints be used in this kind of criminal case. Congress has merely given its permission to prosecutors to use the tool of pretrial restraints on property.

By its letter, the statute that applies in this case requires no adversarial hearing in the present circumstances. But this Court – correctly, I believe – has earlier decided that the Constitution (the combination of the Fifth Amendment and Sixth Amendment) does require some kind of pretrial evidentiary hearing. This appeal presents the question of how broad a hearing is required by the Constitution. This question is important, and one on which the circuits are split. The Supreme Court has never considered the question presented in this appeal.

By freezing a citizen's property at a time when he is presumed innocent of crime, the citizen (and, as a practical matter, his family and perhaps others) is subjected to severe hardship. The hardship includes in this case the inability to employ counsel of Defendants' choice to defend them in court from the mighty power of the federal government in a criminal proceeding. In the criminal proceeding ultimately, both their liberty and their property will be at stake. The chips are down.

In this criminal prosecution, the government is the aggressor. The government initiates the criminal action by bringing charges. The Executive Branch's prosecutors are in the driver's seat, choosing the nature and number of the charges to be brought and here choosing, in addition, to restrain the accused citizens' property before trial. This later step is something extra, beyond ordinary prosecution; and in this case, the step is said to disable Defendants, in fact, from employing counsel to defend themselves.

That this add-on to ordinary prosecution – in effect, the seizure of property in advance of trial – would trigger extra and significant procedural safeguards for the citizen and his property is in no way odd to me. And by a probable cause hearing following the seizure, I do not understand the government to be forced to do anything, much less to try its criminal case twice. The government can simply choose to release the property. If the government does not wish to release the property, an evidentiary hearing should be conducted about probable cause on both the

predicate criminal offense *and* the forfeitability (traceability of assets to supposed crime) of the specified property. At that hearing, the government can decide for itself precisely how much evidence it wishes to present about the criminal offense. If the government does not wish to reveal certain evidence before trial, the government can rightly withhold that evidence.

To ask the government to respond to a challenge on probable cause that the charged crime actually occurred is not to place on the government a heavy burden; everything needed for a conviction at trial is most likely not needed for probable cause. But, in any event, the government can decide for itself what cards to show before the actual trial; the worst that will happen is that the pretrial restraint on property will not continue. The criminal trial still looms ahead.

For the government to participate in an adversary hearing after seizure and before trial is inconvenient, of course. But the government's inconvenience ought not to determine the outcome of this kind of case. The government takes this inconvenience upon itself by making its own choice about how it will proceed in a criminal case. At the outset, the choice to go for pretrial restraint is the prosecutors' to make. Before deciding to employ a strategy that includes a pretrial restraint on a defendant's property, the prosecutors can weigh (1) the extra time and trouble associated with an evidentiary pretrial hearing to keep up the restraint on a defendant's property against (2) the benefit (as the prosecutors see it) to the country that would flow from prohibiting

the defendant from using his property before trial. Cost-benefit choices are a necessary and normal part of life, including litigation.

Furthermore, the outcome of the ultimate trial itself need not be jeopardized by a probable cause hearing; if the government thinks that it is best to keep some evidence secret until the actual trial, the government can keep it secret. Moreover, the probable cause hearing very possibly can be tailored by the presiding judge in such a way as to make the hearing be significantly different from any kind of criminal trial.[1] Besides, even if the government loses at the probable cause hearing, all the property itself might not ultimately be lost to the government – if a conviction is later actually obtained at the criminal trial.[2]

---

[1] This tailoring of the evidentiary hearing functions not just to protect evidence for trial. "In such an adversary hearing, the court could use limitations on the disclosure of evidence, such as *in camera* hearings and appropriate application of the normal rules of evidence to protect the grand jury proceedings against unwarranted invasion." *United States. v. E-Gold, Ltd.*, 521 F.3d 411, 419 (D.C. Cir. 2008); *see also United States v. Monsanto*, 924 F.2d 1186, 1198 (2d Cir. 1991) (en banc) (Fed. R. Evid. do not apply to hearings on whether a pretrial restraint on property can continue).

[2] The government retains the option of obtaining forfeiture of property after the government obtains a conviction. Forfeitable property in the hands of transferees commonly is recoverable by the government. I put aside the question of whether money paid to defense counsel as reasonable fees could be recovered, in a case like this one.

The Constitution's Bill of Rights, including the Fifth and Sixth Amendments, was intended by the Framers to protect citizens from the high power of the federal government. The Constitution is to guarantee each citizen a fair deal when the federal government takes aim at him. More specifically about property, we ought to bear in mind this fact: "*Liberty, property, and no stamps!* It had been the first slogan of the American Revolution." Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787,* at 70 (1966). Property rights, in themselves, deserve to be amply guarded by American courts. But when a citizen's liberty (as in the present case) depends to a high degree on his property, the stakes are particularly high.

For the Federal Executive, in effect, to seize a citizen's property; to deprive him thereby of the best means to defend himself in a criminal case; and then, by means of the criminal case, to take his liberty strikes me as a set of circumstances about which our nation's history and its Constitution demands that the process at each step be fully fair. The potential for the dominating power of the Executive Branch to be misused by the arbitrary acts of prosecutors is real. The courts must be alert. To hear from the other side at a time when it matters (in this instance, before the criminal trial: a trial without counsel of Defendants' choice) is the basic and traditional way that American judges assure things are fair. So, I do think that *Monsanto* and *E-Gold,* as law decisions, are very

possibly on the right tack: stressing judicial responsibility and requiring a broader hearing to keep up a pretrial restraint on property when the restraint interferes with a citizen's abilities to employ legal counsel of his choice to defend him in a criminal proceeding.

Like many appellate judges (probably most), I do not write separately or dissent every time that I find myself in disagreement with the majority of the judges on a case upon which we are working: almost always, the majority has taken a hard look at the case; and their position (in my view) is a reasonable one; and the resulting precedent will make an impression on the body of law that will be neither deep nor wide. I stop to write separately today because the case touches on the fundamentals and, thus, impresses me as being unusually important.

I am satisfied that the panel of judges of which I am a part has genuinely and seriously studied this case. Judge Marcus has written a thoughtful opinion in which Judge Fawsett has fully concurred. I have voiced my doubts, but I cannot firmly conclude that the legal position my experienced, able colleagues have taken is definitely erroneous. Therefore, I do not dissent, although I am uneasy that the limits that we set today for the hearing essential to continue a pretrial restraint on property might well be too limiting under the Constitution.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-80021-CR-MARRA/HOPKINS

UNITED STATES
OF AMERICA,

v.

KERRI L. KALEY and
BRIAN P. KALEY,

Defendants. /

ORDER DENYING DEFENDANTS' MOTION TO VACATE PROTECTIVE ORDER

(Filed Oct. 25, 2010)

BACKGROUND.

This matter is before the Court upon Defendant' Kerri L. Kaley and Brian P. Kaley's Motion to Vacate the *Ex Parte* Protective Order restraining Defendants' property. [DE 6 and 17] The procedural history of this case is fully set forth in the opinion issued by the Eleventh Circuit Court of Appeals in *United States v. Kaley,* 579 F.3d 1246 (11th Cir. 2009). In *Kaley,* the Court of Appeals reviewed an order of this Court which denied Defendants' request for an evidentiary hearing on their motion to vacate the protective order. The Court of Appeals held that this Court erred in its analysis of the four factors to be considered in determining whether an evidentiary hearing was

required.[1] The Court of Appeals remanded the case to this Court to reweigh the factors in light of its ruling. This Court did so and granted Defendants' request for an evidentiary hearing. [DE 193]

At the evidentiary hearing, the parties had divergent views about the scope of the hearing. Defendants asserted that the government had the burden of proof of demonstrating that it was likely to prevail at trial in order for the protective order to remain in effect. [DE 196 at 5; DE 221 at 2] Defendants further claimed that the government's case against them is "baseless." [DE 196 at 4] Therefore, there is no legal basis to continue to restrain Defendants' assets which are needed to retain counsel of their choice, regardless of who has the burden of proof and what that burden is.[2] On the other hand, the

---

[1] In *United States v. Bissell*, 866 F.2d 1343 (11th Cir. 1989), the court adopted the balancing test enunciated in the case of *Barker v. Wingo*, 407 U.S. 514 (1972), and established the four factors to be considered. The four factors are: 1) the length of the delay before the defendants received their post-restraint hearing; 2) the reason for the delay; 3) the defendants' assertion of the right to such a hearing pretrial; and 4) the prejudice the defendants suffered due to the delay weighed against the strength of the United States's interest in the subject property. *Bissell*, 866 F.2d at 1352.

[2] Defendants assert that the burden of proof at this hearing should be on the government to show that "there is a substantial probability that the United States will prevail on the issue of forfeiture." [DE 221 at 2] Defendants acknowledge, however, that the Eleventh Circuit Court of Appeals held that the burden of proof is on them to show that the government did not have probable cause to restrain their assets. *Kaley*, 579 F.3d at

(Continued on following page)

United States argued that the burden is on Defendants to demonstrate that the seized assets are not traceable to or involved in the alleged criminal conduct. Defendants specifically declined to attempt to rebut the government's claim that the seized assets are traceable to or involved in the activity alleged in the indictment. [DE 221 at 3] Because the Court concludes that the law in the Eleventh Circuit supports the government's position, Defendants' motion to vacate the protective order, and their request for the release of the seized assets for the purpose of retaining counsel, is denied.

DISCUSSION.

In this case, a grand jury has found probable cause to believe that Defendants committed the crimes alleged in the superceding indictment. [DE 44] A careful review of the opinions of the Eleventh Circuit Court of Appeals in *Kaley* and *Bissell* demonstrates that the relevant inquiry for this hearing is whether the seized assets are traceable to or involved in the alleged criminal conduct. In *Bissell,* the court noted that Congress, in enacting the forfeiture statute, did not intend there to be a hearing prior to the issuance of the restraint, but recognized the authority of a district court to hold a post-restraint hearing. *Id.*

1257;1268 (Tjoflat, J., specially concurring). In *United States v. Monsanto,* 491 U.S. 600, 615-16 (1989), the Court held that the appropriate burden of proof was probable cause.

at 1349, *citing* S. Rep. No. 225, 98th Cong., 1st Sess. 191, 203, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3128, 3386. The court then described the post-restraint hearing that the district court could hold.

> At that hearing, the defendant may undertake to prove that the government *wrongfully restrained specific assets which are outside the scope of the indictment, not derived from, or used in, criminal activity,* but may not challenge the validity of the indictment itself and thus require that the government present its evidence before trial.

Id. (emphasis added)[3] Later in the opinion, the court reiterated this principle by stating:

> Although the statute does not require the district court to hold a post-restraint hearing, the legislative history evidences that such a hearing may be held *to determine whether legitimate assets – those outside the scope of the indictment – have been wrongfully restrained.*

Id. at 1353.(emphasis added) The court went on to state that:

> The clear danger posed by this statutory scheme is the possibility that perfectly

---

[3] Other Circuit Courts of Appeals have also held that at a post-restraint hearing, the defendant cannot challenge the merits of the crimes charged in the indictment. *United States v. Jones,* 160 F.3d 648 (10th Cir. 1998); *United States v. Moya-Gomez,* 860 F.2d 706, 727-28 (7th Cir. 1988).

> *legitimate assets* will be wrongfully restrained. . . . A wrongful deprivation of *legitimate assets* will severely impair the defense.

Id. at 1354. (emphasis added) Lastly, the court stated that "the district court's probable cause determinations provided a significant check on the government's power to restrain *legitimate, nonindicted assets.*" *Id.* (emphasis added)

This concept of the post-restraint hearing was reaffirmed by the court in *Kaley*. *See Kaley*, 579 F.3d at 1254, 1257-59. The *Kaley* court stated that Defendant could not challenge the validity of the indictment at the post-restraint hearing; the hearing would not be for the purpose of determining guilt or innocense; and by requesting a post-restraint hearing, Defendants "would not be requiring the Government to establish the charged offense," but rather the hearing would be to determine the "propriety of the seizure" *Id.*

The basic thrust of Defendants' challenge to the pretrial restraint of their assets is that the government's case has no merit. Defendants have not attempted to challenge the governments's [sic] assertion, nor this Court's probable cause determination,[4] that the restrained assets are traceable to and involved in the alleged criminal activity. Yet, according to the

---

[4] DE 123 at 2-5.

Eleventh Circuit Court of Appeals,[5] this is precisely the purpose of the hearing, "to determine whether legitimate assets – those outside the scope of the indictment – have been wrongfully restrained." *Bissell,* 866 F.2d at 1349. Because Defendants are challenging the validity of the indictment, and are not challenging the probable cause finding that their restrained assets are traceable to or involved the alleged criminal conduct, Defendants' motion to vacate the protective order [DE 17] is **DENIED.**

Done and Ordered in Chambers in West Palm Beach, Florida, this 24th day of October, 2010.

/s/ [Illegible]
KENNETH A. MARRA
UNITED STATES
DISTRICT JUDGE

---

[5] Other Circuit Courts of Appeals are in accord with the Eleventh Circuit Court of Appeals on limiting the scope of a post-restraint hearing to the question of whether the restrained assets are traceable to or involved in the alleged criminal conduct. *United States v. Farmer,* 274 F.3d 800, 805-06; *Jones,* 160 F.3d at 647-48; *Moya-Gomez,* 860 F.2d at 727-31. *Contra United States v. E-Gold, Ltd.,* 521 F.3d 411, 418 (D.C. Cir. 2008); *United States v. Monsanto,* 924 F.2d 1186, 1203 (2d Cir. 1991) (post-restraint hearing goes to the questions of probable cause of the defendant's guilt as well as to whether the seized assets are traceable to and involved in the alleged criminal conduct).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-80021-CR-MARRA/HOPKINS

UNITED STATES
OF AMERICA,

v.

KERRI L. KALEY and
BRIAN P. KALEY,

Defendants.
_____/

ORDER GRANTING DEFENDANTS' REQUEST FOR A POST-RESTRAINT DUE PROCESS HEARING

(Filed Mar. 29, 2010)

This matter is before the Court based upon the mandate issued by the Eleventh Circuit Court of Appeals. *United States v. Kaley,* 579 F.3d 1246 (11th Cir. 2009). In *Kaley,* the Court of Appeals reviewed an order of this Court which denied Defendants' request for an evidentiary hearing on their motion to vacate a protective order which restrained their use of certain property pending a trial. The Court of Appeals held that this Court erred in its analysis of the four factors required by the case of *United States v. Bissell,* 866 F.2d 1343 (11th Cir. 1989).[1] Specifically, the Court of

[1] The four factors were adopted from the balancing test enunciated in the case of *Barker v. Wingo,* 407 U.S. 514 (1972). The four factors are: 1) the length of the delay before the

(Continued on following page)

Appeals held that this Court did not abuse its discretion in weighing the first two factors in favor of the government. *Kaley*, 579 F.3d at 1256. The court explained, however, that this Court "plainly made an error of law in disposing of *Bissell's* third factor" and further held that "[a]t a minimum then, *Bissell's* third factor, 'the assertion of the right' to a pretrial hearing, should weigh in the defendants' favor when the defendants have taken every available step to contest the restraints." *Id.* at 1258. Lastly, the Court of Appeals held that this Court "should engage in a more searching exposition and calculus of the fourth *Bissell* factor, which requires it to weigh the prejudice suffered by the defendants due to the delay before their post-restraint probable cause hearing against the strength of the United States' interest in the subject property, and take care to give the powerful forms of prejudice that the Kaleys will suffer ample consideration." *Id.* After carefully considering the mandate from the Court of Appeals and re-weighing the *Bissell* factors, the Court finds that Defendants are entitled to an evidentiary hearing.

As previously discussed, the first two *Bissell* factors weigh in favor of the government. *Kaley*, 579

---

defendants received their post-restraint hearing; 2) the reason for the delay; 3) the defendants' assertion of the right to such a hearing pretrial; and 4) the prejudice the defendants suffered due to the delay weighed against the strength of the United States's interest in the subject property. *Bissell*, 866 F.2d at 1352.

F.3d at 1256. The third factor weighs in favor of Defendants. *Id.* at 1257. In reevaluating the fourth factor, the Court notes that it is not, at this time, determining the propriety of continuing the pretrial seizure. Rather, it is only determining whether the seizure should be permitted without affording Defendants an opportunity to challenge it at an evidentiary hearing. The seizure at issue, if wrongful, will deprive Defendants of their ability to retain counsel of their choice, which will "severely impair [their] ability to defend [themselves]." *Kaley,* 579 F.3d at 1258, quoting *Bissell,* 866 F.2d at 1354. This deprivation "is a substantial source of prejudice" in this case. *Kaley,* 579 F.3d at 1258. Moreover, in this case, Defendants will lose "access to long-time counsel who have already invested substantial time into learning the intricacies of [their] case and preparing for trial will unquestionably cause the Kaleys prejudice." *Id.* Additionally, "in order to retain any private counsel (not even counsel of choice), the Kaleys must incur a $183,500 non-recoverable liquidation and tax penalty in order to release their only remaining unrestrained assets (retirement and college savings accounts)." *Id.* at 1258-59. Under the facts of this case, the Court can discern little prejudice to the government in requiring an evidentiary hearing in view of the fact that at such a hearing "the defendant, as the movant, would have the burden of proof, and the prosecution would thus be saved from having to preview its entire case." *Id.* at 1257. When the prejudice to Defendants is weighed against the government's interest of recovering the seized assets without affording Defendants an

evidentiary hearing, the Court concludes that the fourth *Bissell* weighs in favor of Defendants.

In weighing all four factors, and recognizing that the Court has discretion to conduct an evidentiary hearing "notwithstanding the fact that the return of the indictment established probable cause to seize or restrain the assets," *Bissell,* 579 F.3d at 1257, the Court finds that the equities lie in favor of Defendants and an evidentiary hearing to determine the propriety of the pretrial seizure of Defendants is warranted.

In view of all of the foregoing, Defendants' motion for an evidentiary hearing on whether the pretrial restraint of their property should remain in place is **GRANTED.**

Done and ordered in Chambers in West Palm Beach, Florida, this 29th day of March, 2010.

/s/ [Illegible]
KENNETH A. MARRA
UNITED STATES
DISTRICT JUDGE

[PUBLISHED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-13010

D.C. Docket No. 07-80021-CR-KAM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KERRI L. KALEY,
BRIAN P. KALEY,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(August 18, 2009)

Before TJOFLAT, MARCUS and WILSON, Circuit Judges.

MARCUS, Circuit Judge:

In this case, a grand jury sitting in the United States District Court for the Southern District of Florida returned an indictment charging the defendants, Brian Kaley and Kerri Kaley, with conspiracy to transport stolen property, transportation of stolen

property, obstruction of justice, and money laundering. The indictment also included a criminal forfeiture count. After the return of the indictment, the government, *ex parte*, obtained a protective order enjoining the Kaleys from encumbering the property listed in the forfeiture count. The Kaleys moved the district court to vacate the order so they could use the restrained assets to retain counsel of their choice, and they requested that the district court hold an evidentiary hearing to determine whether there was probable cause to believe that the property was forfeitable. The district court declined to hold a hearing and denied the motion to vacate the protective order. The Kaleys now appeal these rulings. After thorough review, we reverse and remand for further proceedings consistent with this opinion.

I.

In January 2005, Kerri Kaley, then a sales representative with Ethicon Endo-Surgery, was informed she was the target of a grand jury investigation in the Southern District of Florida. Kaley was suspected of stealing prescription medical devices ("PMDs") from hospitals and then selling them on the black market. Kaley retained Howard Srebnick of Black, Srebnick, Kornspan & Stumpf, P.A. as her counsel in the investigation. Kaley's husband, Brian Kaley, who was also under investigation was initially represented by Howard Srebnick and later retained a separate attorney, Susan Van Dusen, to avoid a potential conflict of interest. Together, the two attorneys informed

the Kaleys that their legal fees to take the case through trial would be approximately $500,000. To obtain funds to pay those fees, the Kaleys applied for and obtained a home equity line of credit of $500,000 on their residence and used the proceeds to buy a certificate of deposit ("CD").

On February 6, 2007, the grand jury returned a seven-count indictment against the Kaleys.[1] Count One charged a conspiracy to transport PMDs in interstate commerce while knowing them to have been stolen, in violation of 18 U.S.C. § 371. Counts Two through Six charged five substantive § 2314 offenses,[2] and Count Seven charged obstruction of justice, in violation of 18 U.S.C. § 1512(b)(3). The indictment also sought criminal forfeiture of all property traceable to the § 2314 offenses, including the CD, and a money judgment in the amount of $2,195,635.28.[3]

---

[1] The indictment was also returned against Jennifer Gruenstrass, whose case has since been severed from the Kaleys'.

[2] Section 2314 provides that "[w]hoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud" shall be subject to criminal liability. 18 U.S.C. § 2314.

[3] The forfeiture was authorized by the civil forfeiture statute, 18 U.S.C. § 981(a)(1)(C), which provides for forfeiture of property actually "traceable to" the specific crime alleged – here, conspiracy to violate and violations of § 2314. Such forfeiture can become part of a criminal sentence pursuant to 28 U.S.C. § 2461(c), which provides in pertinent part that "[i]f the defendant is convicted of the offense giving rise to the forfeiture, the

(Continued on following page)

On February 7, 2007, the Government moved the district court *ex parte* for a protective order restraining the Kaleys from transferring or otherwise disposing of the property listed in the forfeiture count, and a magistrate judge, concluding that the indictment established probable cause that the property was "traceable to" the Kaleys' commission of the § 2314 offenses, granted the motion the same day.[4] The next day, the Government filed a notice of *lis pendens* against the Kaleys' residence.

On March 5, 2007, the Kaleys moved the district court to vacate the February 7th protective order. They contended that the order prevented them from retaining counsel of their choice in violation of their Sixth Amendment right to the representation of counsel. A magistrate judge heard this motion too on April 6th[5] and sustained the protective order; however, he

---

court shall order the forfeiture of the property as part of the sentence in the criminal case." The "traceable to" language limited the United States to forfeiture of $140,000 of the Kaleys' assets.

[4] The Government based its motion on § 413 of the Controlled Substances Act, 21 U.S.C. § 853, which provides that "[u]pon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the property [listed in the forfeiture count]." That section of the Controlled Substances Act applies to the Kaleys pursuant to 28 U.S.C. § 2461(c). *See supra* note 3.

[5] The motion was referred to a second magistrate judge, who handled the case in place of the initial magistrate judge.

(Continued on following page)

limited the protective order's scope (insofar as it applied to the CD) to $140,000.[6]

On April 10, 2007, the grand jury returned a superseding indictment. This indictment replicated the first seven counts of the first indictment and added an additional count – a charge that the Kaleys had conspired to launder the proceeds of the § 2314 offenses, in violation of 18 U.S.C. § 1956(h).[7] This indictment also sought the criminal forfeiture of the CD and the Kaleys' residence on the theory that those assets were "involved in" the Kaleys' commission of the § 1956(h) offense.[8] On April 17th, the Kaleys renewed their motion to vacate the February 7th protective order (as amended by the order of April 6th), and expressly requested a pretrial, post-restraint evidentiary hearing.[9]

This magistrate judge heard the Kaleys' motion during a telephone conference call, which was not recorded or transcribed.

[6] At the same time, the magistrate judge scheduled a hearing for April 16, 2007 on the Kaleys' motion to vacate the protective order in its entirety.

[7] Section 1956(h) provides that "any person who conspires to commit any offense defined in this section or § 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

[8] By adding the money laundering conspiracy to the indictment, the grand jury enabled the United States to utilize the criminal forfeiture statute, 18 U.S.C. § 982(a)(1), which authorizes forfeiture of assets "involved in" – rather than "traceable to the proceeds of" – the offense.

[9] In addition to moving the district court to vacate the protective order, the Kaleys moved the district court to strike

(Continued on following page)

The magistrate judge heard the motion on April 27th. He questioned whether the indictment alone provided probable cause to restrain the defendants' assets and ordered the prosecutor to submit an affidavit supporting probable cause. The prosecutor responded by filing, in secret and under seal, an affidavit executed by the FBI case agent.

On May 1, 2007, the magistrate judge issued two orders. In the first order, he found probable cause –

---

from the indictment the allegation seeking forfeiture under 18 U.S.C. § 982(a)(1) on the ground that the allegation was "vindictive," in retaliation for the Kaleys having moved the court on March 5th to vacate the February 7th protective order. The Kaleys also moved the district court to strike from the indictment the allegation seeking forfeiture under 18 U.S.C. § 981(a)(1)(C) on the ground that § 981(a)(1)(C) could not be applied without violating the Ex Post Facto Clause. The district court denied both motions.

In their blue brief, the Kaleys ask us to review these two rulings as well, which are not independently appealable, under the doctrine of pendent appellate jurisdiction. "Under the pendent appellate jurisdiction doctrine, we may address [such] orders [only] if they are 'inextricably intertwined' with an appealable decision or if 'review of the former decision [is] necessary to ensure meaningful review of the latter.'" *Hudson v. Hall*, 231 F.3d 1289, 1294 (11th Cir. 2000) (quoting *Summit Med. Assoc., P.C. v. Pryor*, 180 F.3d 1326, 1335 (11th Cir. 1999)) (quotation marks omitted). However, the two rulings are not inextricably intertwined with the district court's ruling denying the Kaleys' motion for a pretrial hearing on the validity of the February 7th protective order; nor is review of those rulings necessary to ensure meaningful review of the district court's June 25, 2007 order denying the pretrial, post-restraint hearing the Kaleys are seeking. We, therefore, decline to exercise our pendent appellate jurisdiction.

based on the indictment and the case agent's affidavit – that the CD and the Kaleys' residence were "involved in" the violations of § 1956(h) and § 2314. In the second order, he amended the February 7th protective order to include within its scope the full value of the CD and the Kaleys' residence. On May 2nd, the magistrate judge issued a third order denying the Kaleys' motion to vacate the protective order and to hold a pretrial, post-restraint evidentiary hearing. In that order, the magistrate judge concluded that "no post-restraint hearing was necessary until trial."

On May 7, 2007, the Kaleys appealed the magistrate judge's May 1st and 2nd orders to the district court. On June 25th, the district court affirmed the magistrate judge's issuance of the protective order, concluding that the case agent's affidavit "demonstrated probable cause to believe that the Defendants' residence was 'involved in' the money laundering offense charged in the superseding indictment, and that all but $63,007.65 of the funds used to obtain the CD were 'traceable to' the residence." The trial court also affirmed the magistrate judge's denial of a pretrial evidentiary hearing, concluding that postponing the hearing until the trial itself satisfied due process. On June 27, 2007, the Kaleys lodged this interlocutory appeal, challenging the district court's decision.

II.

This Court has jurisdiction to entertain appeals of "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing, or dissolving injunctions." 28 U.S.C. § 1292(a)(1). Protective orders designed to preserve forfeitable assets, like the one in this case, qualify as injunctions for the jurisdictional purposes of § 1292(a)(1). *United States v. Monsanto,* 491 U.S. 600, 602-06 (1989) (exercising interlocutory jurisdiction to review a pretrial restraining order, which was granted *ex parte* for the purpose of preserving forfeitable assets prior to forfeiture); *Roberts v. United States,* 141 F.3d 1468, 1471 (11th Cir. 1998) (stating that denial of a motion to vacate a protective order over forfeitable assets would be reviewable as an interlocutory order in the appellate courts under § 1292(a)(1)). Such protective orders are like injunctions because they are "directed to a party, enforceable by contempt, and designed to accord or protect some or all of the substantive relief sought by the complaint in more than temporary fashion." 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3922, at 65 (2d. ed. 1996) (quotation marks omitted). We, therefore, review under § 1292(a)(1) the district court's order denying the Kaleys' motion to vacate the protective order and denying them a pretrial evidentiary hearing.

III.

With our jurisdiction settled, we address the main issue raised today: the Kaleys' argument that they have a due process right to a post-indictment, pretrial evidentiary hearing on the legality of the restraints on their property especially needed for the purpose of retaining counsel of their choice. In doing so, we are controlled by our decision in *United States v. Bissell,* 866 F.2d 1343 (11th Cir. 1989). *Bissell* presented the same argument and this Court clearly held that a defendant whose assets are restrained pursuant to a criminal forfeiture charge in an indictment, rendering him unable to afford counsel of choice, is entitled to a pretrial hearing *only* if the balancing test enunciated in *Barker v. Wingo,* 407 U.S. 514 (1972), is satisfied. *Id.* at 1353. Thus, our task in this appeal is to decide whether the district court correctly interpreted and applied the *Barker* balancing test. After thorough review, we conclude that the district court incorrectly applied that test, and we, therefore, reverse and remand the case for further consideration consistent with this opinion.

In *Bissell,* a grand jury indicted each of the defendants with one or more of the following offenses: violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*; engaging in a Continuing Criminal Enterprise, 21 U.S.C. § 848; and conspiring to import cocaine, 21 U.S.C. § 846. *Bissell,* 866 F.2d at 1347. The indictment contained criminal forfeiture counts pursuant to 21 U.S.C. § 853, in which the grand jury alleged that

all assets derived from, or devoted to, violations of federal narcotics laws were subject to forfeiture upon the defendants' convictions. *Id.* Following the return of the indictment, the Government seized the defendants' assets pursuant to a warrant it obtained from the district court *ex parte* pursuant to 21 U.S.C. § 853(f). *Id.* No pretrial, post-indictment motion was made to the district court contesting the legality of the court-ordered restraints and no hearing was sought. *Id.* at 1347-48, 1353.

On appeal, the *Bissell* defendants argued, among other things, that they were entitled under the Fifth Amendment's Due Process Clause to a pretrial hearing at which the government must demonstrate that the forfeiture was justified *and* that the failure to provide that hearing fatally tainted their convictions. *Id.* at 1352. A panel of this Court directly addressed and unambiguously rejected this claim, applying the *Barker v. Wingo* framework and holding[10] under the

---

[10] *Bissell*'s determination that the *Barker* factors should be used to evaluate when a defendant is entitled to a post-indictment, pretrial hearing under due process of law is holding, not dicta. As our cases frequently have observed, dicta is defined as those portions of an opinion that are "not necessary to deciding the case then before us." *United States v. Eggersdorf*, 126 F.3d 1318, 1322 n.4 (11th Cir. 1997); *Schwab v. Crosby*, 451 F.3d 1308, 1327 (11th Cir. 2006); *Jordan v. Hamlett*, 312 F.2d 121, 124 (5th Cir. 1963); *Carpenter Paper Co. v. Calcasieu Paper Co.*, 164 F.2d 653, 655 (5th Cir. 1947); *see also United States v. Crawley*, 837 F.2d 291, 292 (7th Cir. 1988) ("We have defined dictum as a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of

(Continued on following page)

---

the holding.") (quotation marks omitted). Conversely, the holding of a case is, as the Supreme Court observed, comprised both of the result of the case and "those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66-67 (1996). *Bissell*'s conclusion that there was no violation of the defendants' Fifth Amendment due process rights was necessary to its ultimate decision. In fact, *Bissell*'s adoption and use of the *Barker* test forms a critical part of the case's holding. Our conclusion that the defendants' due process rights were not violated was driven by, and cannot be understood apart from our application of the *Barker* test to the facts of the case. While it is true that the court could have decided the case on other grounds, such as plain error, the panel resolved the defendant's due process claim by explicating and applying the *Barker v. Wingo* analysis.

Despite the suggestion in the special concurring opinion, it is of no moment that it was the *Bissell* panel, and not the parties, that proposed the *Barker* analysis as the legal rule of decision. Plainly, this Court employed the *Barker* factors to determine whether a pretrial hearing was required. There is no requirement in our law that the explication of the governing principle of law may only be taken from an argument advanced by a party. What matters in discerning whether a rule of law expounded by a court is in fact holding is whether it was *necessary* to the result reached, or, in the alternative, could be discarded without impairing the foundations of the holding. And here, a panel of this Court deliberately and carefully offered the analytical framework set forth in *Barker* as the way to analyze and ultimately decide the issue.

We add that another prior panel of our Court has also observed that *Bissell*'s application of the *Barker* factors is holding. *United States v. Register* questioned the soundness of *Bissell*, observing that "in the appropriate case" *Bissell* "perhaps should" be re-examined in light of the fact that we are "the only circuit *holding* that, although pre-trial restraint of assets needed to retain counsel implicates the Due Process Clause, the trial itself satisfies this requirement." 182 F.3d 820, 835 (11th Cir. 1999) (emphasis added). And our Court is not the only one to

(Continued on following page)

circumstances of the case that the defendants were not entitled to a post-indictment, pretrial hearing. Indeed, we framed the specific issue before us this way:

> [Appellants] contend that this scheme violate[d] due process. They argue that when pretrial restraints are imposed on assets, the Fifth Amendment requires a hearing on the merits at which the government must prove the probability that the defendant will be convicted and that his assets will be forfeited. Since no such hearing occurred in this case, appellants urge that they have been denied due process of law. We disagree.

Id. at 1352; *see also id.* ("We must consider whether appellants had a right to an immediate post-restraint hearing.").

The *Bissell* panel recognized that "once an indictment has issued, the court may order such restraints [to preserve forfeitable assets in a criminal

---

have thought that the application of the *Barker* factors by the *Bissell* court constituted holding. *See, e.g., United States v. Monsanto*, 924 F.2d 1186, 1191 (2d Cir. 1991); *United States v. Holy Land Found. for Relief & Dev.*, 493 F.3d 469, 475 (5th Cir. 2007); *United States v. Kirschenbaum*, 156 F.3d 784, 793 (7th Cir. 1998); *United States v. Farmer*, 274 F.3d 800, 803 (4th Cir. 2001); 13 Fed. Proc. § 35:790 ("At the other end of the spectrum, the Eleventh Circuit has held that there is no due process right to a hearing prior to the entry of an order freezing a defendant's property, and the due process clause imposes no bright line dictating when a post-restraint hearing might occur in a criminal forfeiture case.").

case] *ex parte.*" *Id.* at 1349. In addition, the Court explained that by its own terms 21 U.S.C. § 853(a)(1) does not require a hearing before or after the restraint of assets, and that "the statute's legislative history reveals that while Congress did not intend there to be a hearing prior to the issuance of a restraint, the district court does retain authority to hold a post-restraint hearing." *Id.* (citing S. Rep. No. 225, 98th Cong., 1st Sess. 191, 203, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3386). Further, the panel observed:

> At that hearing, the defendant may undertake to prove that the government wrongfully restrained specific assets which are outside the scope of the indictment, not derived from, or used in, criminal activity, but may not challenge the validity of the indictment itself and thus require that the government present its evidence before trial.

Id.

In deciding which analytical framework to apply to determine what process, if any, is due to a criminal defendant whose assets have been restrained pursuant to a criminal forfeiture charge thereby preventing him from retaining his counsel of choice, the *Bissell* panel looked to *United States v. $8,850 in U.S. Currency,* 461 U.S. 555 (1983), for guidance. In that case, the Supreme Court addressed the narrow question of whether an eighteen-month delay between the seizure of currency that was being transported without being reported to the U.S. Customs Service, in violation

of 31 U.S.C. § 1101, and the resulting civil forfeiture proceedings, violated the due process rights of an individual with an interest in the seized currency. *Id.* at 556-62. In *$8,850,* the Court imported the four-factor balancing test laid out in *Barker v. Wingo,* 407 U.S. 514 (1972), a case that assessed whether a delay in trying a criminal case violated a defendant's Sixth Amendment right to a speedy trial as the applicable analytical framework. The stated reason for importing the *Barker* test into the realm of the defendant's claim under the due process clause in *$8,850* was that "the Fifth Amendment claim here – which challenges only the length of time between the seizure and the initiation of the forfeiture trial – mirrors the concern of undue delay encompassed in the right to a speedy trial." *Bissell,* 866 F.2d at 1352 (quoting *$8,850,* 461 U.S. at 564). *Bissell,* in turn, imported the *Barker* test into the realm of a defendant's due process claim when his assets were restrained without a hearing pursuant to § 853, thereby preventing him from retaining counsel of choice.

Thus, in *Bissell,* we evaluated the defendants' claim in light of the four factors taken from *Barker*: (1) the length of the delay before the defendants received their post-restraint hearing; (2) the reason for the delay; (3) the defendants' assertion of the right to such a hearing pretrial; and (4) the prejudice the defendants suffered due to the delay weighed against the strength of the United States's interest in the subject property. 866 F.2d at 1352.

As for the first of the *Barker* factors, in *Bissell,* we concluded that no post-restraint hearing was necessary because the delay of eight months between the restraint of the assets and the criminal trial was insignificant. 866 F.2d at 1353. As for the reason for delaying the hearing until trial (the second of the *Barker* factors), we referenced the statute's legislative history and explained that requiring the government to meet the requirements for issuing a temporary restraining order and to establish the merits of the underlying criminal case and the forfeiture before the trial would make obtaining a restraining order difficult because of the abundant dangers surrounding the premature disclosure of the government's case and its witnesses. *Id.*

As for the third factor, we held that whether the defendants' asserted their right to a post-indictment hearing prior to trial, weighed against the defendants in *Bissell* because the defendants "d[id] not point to, and the record d[id] not disclose, any motion for a hearing to contest the government's restraints." *Id.* at 1353.

Finally, as for the last of the *Barker* factors (the prejudice associated with the restraint), we recognized the not inconsiderable danger that "perfectly legitimate assets will be wrongfully restrained," which would, in turn, result in palpable prejudice to the defendant, particularly when the defendant sought to use those assets to retain counsel of his choice. 866 F.2d at 1354. But, we observed, when both parties arguably have property rights in the constrained

assets, "a due process analysis must comprehend both interests." *Id.* Finally, weighing the four *Barker* factors in concert, we concluded that the defendant suffered no due process violation. *Id.*

The Kaleys argue, however, that *Bissell* is no longer good law in light of the United States Supreme Court's recent decision in *United States v. Gonzalez-Lopez,* 548 U.S. 140 (2006). They are mistaken. We may disregard the holding of a prior opinion only where that "holding is overruled by the Court sitting en banc or by the Supreme Court." *Smith v. GTE Corp.,* 236 F.3d 1292, 1300 n.8 (11th Cir. 2001). To constitute an "overruling" for the purposes of this prior panel precedent rule, the Supreme Court decision "must be clearly on point." *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.,* 344 F.3d 1288, 1292 (11th Cir. 2003); *see also Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.,* 475 F.3d 1228, 1230 (11th Cir. 2007) ("Of course, we will not follow prior panel precedent that has been overruled by a Supreme Court decision, but without a clearly contrary opinion of the Supreme Court or of this court sitting en banc, we cannot overrule a decision of a prior panel of this court.") (quotation marks and citations omitted); *United States v. Chubbuck,* 252 F.3d 1300, 1305 n.7 (11th Cir. 2001) ("[T]he prior precedent rule would not apply if intervening on-point case law from either this Court en banc, the United States Supreme Court, or the Florida Supreme Court existed."). In addition to being squarely on point, the doctrine of adherence to prior precedent also mandates that the intervening

Supreme Court case actually abrogate or directly conflict with, as opposed to merely weaken, the holding of the prior panel. *See In re Provenzano,* 215 F.3d 1233, 1235 (11th Cir. 2000) ("We would, of course, not only be authorized but also required to depart from [our prior decision] if an intervening Supreme Court decision actually overruled or conflicted with it."); *Chambers v. Thompson,* 150 F.3d 1324, 1326 (11th Cir. 1998) ("We are bound to follow a prior panel or en banc holding, except where that holding has been overruled or undermined to the point of abrogation by a subsequent en banc or Supreme Court decision.").

In *Gonzalez-Lopez,* the Supreme Court addressed whether a district court erroneously refused the defendant's chosen counsel the right to practice *pro hac vice* before that court. 548 U.S. at 147-51. The government conceded that the denial deprived the defendant of counsel of choice, and the Supreme Court reversed, finding the disqualification to be erroneous and not subject to harmless error review. *Id.* The case in no way addressed what, if any, right a criminal defendant has to use assets subject to criminal forfeiture pursuant to an indictment in order to pay for the legal fees of the counsel of his choice. Nor did the case in any way address the circumstances under which a defendant making a Sixth Amendment counsel of choice challenge to a post-indictment pretrial restraint would be entitled to a hearing. Thus, it cannot be said that *Gonzalez-Lopez* is "clearly on point," or that it "directly conflicts with" the analytical

framework announced by this Court in *Bissell*. In fact, the Supreme Court itself said in *Gonzalez-Lopez* that "[n]othing we have said today casts any doubt or places any qualification upon our previous holdings that limit the right to counsel of choice and recognize the authority of trial courts to establish criteria for admitting lawyers to argue before them," *id.* at 151, including cases such as *Bissell*. Accordingly, the district court was bound to apply *Bissell* in exercising its discretion to award the Kaleys a hearing.

In the case at hand, the district court did employ the *Bissell* factors to determine whether the Kaleys had a due process right to a pretrial evidentiary hearing on the legality of the restraints. It addressed each of the four factors and found that the first and second factors weighed in favor of the Government. Among other things, the district court found that the length of delay in this case (a projected eight months) was not significant and that the government had a substantial interest in not revealing its case and witnesses before trial. Neither of these two determinations amounts to an abuse of discretion, although it is worth noting in passing that in this white collar case the defendants have already had access to much of the government's evidence as the case against their co-conspirator, Jennifer Gruenstrass, was severed and she was tried and acquitted in November, 2007. *See Bissell*, 866 F.2d at 1349 (explaining that the legislative history of 21 U.S.C. § 853(a)(1) "reveals that while Congress did not intend there to be a hearing prior to the issuance of a restraint, the district

court does retain authority to hold a post-restraint hearing.").

As for the third factor – the defendants' pretrial assertion of their right – the district court held that

> [w]hile Defendants have [asserted their right to a hearing] in this case, that fact does not end the inquiry. As the *Bissell* court noted, the purpose of a post-restraint hearing is to determine whether legitimate assets – those outside the scope of the indictment – have been wrongfully restrained. In the present case, *based upon* the money laundering charge and *this Court's probable cause determination, the only way Defendants could demonstrate that the restrained assets,* other than the $63,007.65 that is being released by this order, *are outside the scope of the indictment is to challenge its validity on the merits.* As has been seen previously, such a challenge cannot be made pretrial. At best, the third factor is in equipoise.

United States v. Kaley, No. 07-80021-CR, 2007 WL 1831151, at *3 (S.D. Fla. June 25, 2007) (citations and quotations omitted) (emphasis added and omitted). As for the fourth factor, the district court did not clearly state whether it cut in favor of or against a pretrial evidentiary hearing, observing only that "a district court's probable cause determination, as is present here, diminishes the prejudicial effect of the pretrial restraint," but offering no indication of the nature, degree, or impact of any such diminution. *Id.* at *4.

The district court plainly made an error of law in disposing of *Bissell*'s third factor. As the underscored language of the district court's holding reveals, in evaluating the third factor, the district court concluded that, under *Bissell*, once probable cause has been determined, the only way that a defendant can show that assets are not forfeitable is to establish that the crime charged in the indictment did not occur. This, however, was not the holding of *Bissell* and could not have been the opinion's intent, because, as the district court correctly noted, a challenge to the indictment cannot be made pretrial. A pretrial challenge to the indictment would require the district court to hold an evidentiary hearing to determine whether the crime occurred. The court would hear the Government's case and the defendant's response, and then determine whether the crime had occurred and, thus, whether the assets were forfeitable. In many cases, such a hearing would go so far as to render the trial on the merits of the criminal charge unnecessary. In short, such a procedure would require the Government to preview its case – at the very least, the Government would have to put on enough evidence to withstand a motion to dismiss the charge. But the *Bissell* court undeniably contemplated some circumstances in which, despite the presence of probable cause, a pretrial hearing would be required.

The principle of law *Bissell* advances is that, after weighing the four *Barker* factors, the district court *may* grant the defendant's request for a pretrial evidentiary hearing in order to determine whether

assets described in the forfeiture count of the indictment were wrongly seized (or placed under the restraint of a protective order). The court in an appropriate case may grant the defendant's request notwithstanding the fact that the return of the indictment established probable cause to seize or restrain the assets, possibly, as in the Kaleys' case, with that probable cause buttressed by an affidavit submitted by the case agent *ex parte* and in camera. The purpose of the hearing would not be to determine guilt or innocence but, rather, to determine the propriety of the seizure. Moreover, in such a hearing, the defendant, as the movant, would have the burden of proof, and the prosecution would thus be saved from having to preview its entire case.

This is the same approach that the Supreme Court has taken in civil cases where property is seized based on an *ex parte* proceeding. *See, e.g., Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). In these cases, a creditor claims an interest in a debtor's property and files suit against the debtor to obtain such interest. *Id.* at 601-02. To ensure that the property is not disposed of prior to the trial on the merits, the creditor obtains a court order freezing the debtor's property by making an *ex parte* showing of probable cause that the creditor is likely to prevail on the merits. *Id.* at 602-03. The Supreme Court has held that, in these situations, the debtor is, at least, owed a post-restraint hearing to determine whether probable cause actually exists. *See id.* at 607; *Fuentes v. Shevin*, 407 U.S. 67 (1972). The post-restraint hearing the

Court has ordained, however, is not the trial on the merits of the plaintiff's claim. *Mitchell,* 416 U.S. at 603 (identifying the pretrial hearing as separate from the trial on the merits). Rather, the purpose of the hearing is to reduce the possibility that the court imposed the restraint improvidently. *Fuentes,* 407 U.S. at 81, 92 S. Ct. at 1994 (noting that the purpose of a pretrial hearing is to prevent "substantively unfair and simply mistaken deprivations of property interests").

It is clear, then, that notwithstanding the district court's probable cause determination, the Kaleys were entitled to challenge the restraints on their assets; in doing so, they would not be requiring the Government to establish the charged offense. Because the Kaleys challenged the restraints early and often, this case is very different than *Bissell,* where "nothing in the record indicate[d] that [the defendants] desired an early hearing to contest the government's restraints." *Bissell,* 866 F.2d at 1353. At a minimum then, *Bissell*'s third factor, the "assertion of the right" to a pretrial hearing, should weigh in the defendants' favor when the defendants have taken every available step to contest the restraints.

In addition, the district court also should engage in a more searching exposition and calculus of the fourth *Bissell* factor, which requires it to weigh the prejudice suffered by the defendants due to the delay before their post-restraint probable cause hearing against the strength of the United States' interest in the subject property, and take care to give the powerful

forms of prejudice that the Kaleys will suffer ample consideration. 866 F.2d at 1354. As *Bissell* pointed out, a wrongful deprivation of a defendant's legitimate assets rendering him unable to retain his counsel of choice will severely impair his ability to defend himself. *Id.* at 1354. Indeed, our law is clear and unambiguous that depriving a defendant of the counsel of his choice is a serious and significant impediment to his ability to effectively navigate our nation's criminal procedures and protections. *See Gonzalez-Lopez*, 548 U.S. at 146 ("[T]he Sixth Amendment right to counsel of choice . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided – to wit, that the accused be defended by the counsel he believes to be best."); *Wheat v. United States*, 486 U.S. 153, 159 (1988) (explaining that, although it is subject to limitations to ensure representation by effective counsel, "the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment"); *see generally United States v. Garey*, 540 F.3d 1253, 1263 (11th Cir. 2008) (*en banc*) ("The right to counsel is a fundamental part of the adversary system of criminal justice and recognizes the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty.") (quotation marks and citation omitted).

Being effectively shut out by the state from retaining the counsel of one's choice in a serious criminal case is a substantial source of prejudice, but

the inequities in this case actually go beyond being able to retain the counsel of choice. The restraint of assets in the present case prohibits the Kaleys not only from retaining their counsel of choice, but also from retaining the experienced attorneys who have represented them since the grand jury investigation began in January, 2005. Losing access to long-time counsel who have already invested substantial time into learning the intricacies of the Kaleys' case and preparing for trial will unquestionably cause the Kaleys prejudice.

Moreover, in order to retain any private counsel (not even the counsel of choice), the Kaleys must incur a $183,500 non-recoverable liquidation and tax penalty in order to release their only remaining unrestrained assets (retirement and college savings accounts). On this record, it is clear that in order to access the $323,000 contained in their 401(k) plan at the time the district court considered their motion, the Kaleys would be forced to pay $168,000 in early withdrawal penalties and income taxes leaving them with only $155,000 to allocate for their legal fees. To access the $111,000 contained in college savings accounts, the Kaleys must pay $15,000 in liquidation penalties and capital gains taxes. And, even if they ultimately prevail in this case, the Kaleys will never be able to recover those penalties and taxes.

These serious and substantial burdens must be weighed by the district court against the government's real interest in recovering the seized assets if, indeed, the Kaleys are guilty of the charged criminal

conduct and those assets are found to be traceable to the illicit activity. This interest is supported in some measure by the grand jury's probable cause determinations in returning two indictments seeking the criminal forfeiture of the CD and the Kaleys' residence, as well as by the probable cause affidavit executed by the FBI case agent and filed by the Government. *See Bissell,* 866 F.2d at 1354 ("[T]he district court's probable cause determinations provided a significant check on the government's power to restrain legitimate, nonindicted assets."). We leave it to the district court to weigh the powerful competing interests in order to calculate whether the probable cause determination and the accompanying government affidavit diminish the undeniable and substantial prejudice the Kaleys will suffer if they are forced to liquidate their remaining unrestrained assets and retain new counsel at this stage in the proceedings. Under *Bissell,* therefore, the trial court must re-weigh the *Barker* factors in order to calculate whether the Kaleys are entitled to a post-indictment pretrial evidentiary hearing.

IV.

If we were writing on a blank slate today we would be inclined, as Judge Tjoflat suggests in his special concurrence, to apply the test announced by the Supreme Court in *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), in order to determine what process is due to defendants in circumstances like these.

Indeed, virtually every circuit to address this issue other than this Court has found that criminal defendants such as these are entitled, under the Due Process Clause of the Fifth Amendment, to a pretrial hearing in order to determine whether it is likely that the restrained assets will be subject to forfeiture.[11] *See Holy Land Found. for Relief & Dev.*, 493 F.3d at 475; *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998); *Monsanto*, 924 F.2d at 1195-98; *United States v. Moya-Gomez*, 860 F.2d 706, 728-29 (7th Cir. 1988); *United States v. Harvey*, 814 F.2d 905, 929 (4th Cir. 1987), *superseded as to other issues, In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F.2d 637 (4th Cir. 1988) (*en banc*), *aff'd*, 491 U.S. 607 (1989); *United States v. Crozier*, 777 F.2d 1376, 1384 (9th Cir. 1985); *United States v. Lewis*, 759 F.2d 1316, 1324-25 (8th Cir. 1985); *cf. United States v. Long*, 654 F.2d 911, 915 (3d Cir. 1981). In fact, the more recent cases have utilized the balancing test employed in *Mathews*.

The *Mathews* test may be particularly well suited to the present case, because it is the traditional test employed in order to determine what process is due before a deprivation of property at the hands of the

---

[11] Because 21 U.S.C. § 853(1)(a), the statute governing the procedures applicable to a criminal forfeiture charge, does not expressly provide for a pretrial hearing regarding a post-indictment restraint of assets subject to criminal forfeiture, such a hearing is required only because it may be mandated by the Fifth Amendment's right to due process.

state may be sustained. *See Mathews,* 424 U.S. at 333 (deciding whether an individual is entitled to a hearing under the Fifth Amendment to contest the government's deprivation of a property interest); *Grayson v. King,* 460 F.3d 1328, 1340 (11th Cir. 2006) ("*Mathews* applies only where an individual has a liberty or property interest that the government seeks to eliminate."); *see also Moya-Gomez,* 860 F.2d at 725-26 (determining that the defendant suffered "a deprivation of property in the constitutional sense," because "[t]he restraining order . . . operates to remove the assets from the control of the defendant on the claim of the government that it has a higher right to those assets. While the restraining order does not divest definitively the ownership rights of the defendant, it certainly does remove those assets from his immediate control and therefore divest him of a significant property interest"). There can be little doubt that the posture of this case plainly deprives the defendants of their assets and that the question the Kaleys have raised is one of procedural due process.

If we were to apply *Mathews* in this case, the Kaleys would be entitled to a pretrial hearing on the merits of the protective order. At the end of the day, however, we are duty bound to apply our case precedent and examine this matter under the framework outlined by this Court in *Bissell.*

V.

In sum, the district court did not abuse its discretion in assessing the first two *Bissell* factors. But, the district court plainly made an error of law in interpreting and applying the third of the *Bissell* factors. On the record before us, this factor weighed in the defendants' favor as a matter of law. Moreover, the district court did not make a clear finding as to the fourth *Bissell* factor – the prejudice associated with the restraint. We, therefore, reverse the district court's decision and remand the case to the district court so that it may recalibrate the fourth *Bissell* factor, and then weigh all of the factors together in order to determine the defendants' entitlement to a post-indictment evidentiary hearing.

REVERSED and REMANDED.

TJOFLAT, Circuit Judge, specially concurring:

I agree with the court's decision to reverse and remand, but I write separately because I disagree with the court's rationale for its decision. The court reverses and remands because it holds that the district court misapplied the four factor test from *United States v. Bissell*.[1] That test, which uses *Barker v. Wingo*'s Sixth Amendment speedy-trial standard to

---

[1] *United States v. Bissell*, 866 F.2d 1343 (11th Cir. 1989).

resolve the procedural due process issue this appeal presents, was not necessary to the holding in *Bissell* and is therefore non-binding dicta. The district court erred in relying on the *Bissell* test because the test cannot, in my view, be squared with Supreme Court procedural due process precedent.[2] As I shall explain, the court should have resolved this appeal using that Supreme Court precedent rather than the contradictory dicta from our own circuit.

I.

In *Bissell,* the defendants were indicted for various violations of the federal narcotics laws. *Bissell,* 866 F.2d at 1347. The grand jury later returned two superceding indictments, containing counts seeking the forfeiture of assets pursuant to 21 U.S.C. § 853. *Id.* After the superseding indictments were returned, the Government appeared before the district court *ex parte* and obtained the issuance of warrants authorizing the Government to seize the assets listed in the forfeiture counts,[3] including the

---

[2] *See Barker v. Wingo,* 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

[3] The district court issued the warrants pursuant to 21 U.S.C. § 853(f), which states:

> (f) Warrant of seizure
>
> The Government may request *the issuance of a warrant authorizing the seizure of property* subject to forfeiture under this section *in the same manner as provided for a search warrant.* If the court determines that there is probable cause to believe that the property

(Continued on following page)

defendants' bank accounts. *Id.* The Government then executed the warrants and seized the assets. *Id.* In due course, the case proceeded to trial, and the defendants were convicted. *Id.* at 1348 & n.2. At sentencing, the assets listed in the forfeiture counts were forfeited to the United States as part of the defendants' sentences.

At no point following the Government's seizure of the defendants' assets did any of the defendants move the district court to quash the warrants or otherwise challenge the validity of the Government's retention of their assets.[4] *Id.* at 1353. On appeal, for the first time, the defendants challenged "the constitutionality of the *ex parte,* pretrial restraints on their assets." *Id.* at 1348.[5] Even in their brief on appeal, the

---

> to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(emphasis added). Fed. R. Crim. P. 41 provides the procedure for obtaining a search warrant and, thus, the seizure of property subject to forfeiture. Fed. R. Crim. P. 41(g) provides a procedure for challenging the seizure. *See infra* note 4.

[4] The defendants could have challenged the seizure of their property in the district court pursuant to Fed. R. Crim. P. 41(g). *See supra* note 3.

[5] The defendants had waived their challenge to the constitutionality of the *ex parte* restraints by not presenting it to the district court. *See Madu v. U.S. Att'y Gen.*, 470 F.3d 1362, 1366 n.2 (11th Cir. 2006) ("[A]n argument made for the first time in the court of appeals is generally waived. . . .") (citing *Sterling*

(Continued on following page)

defendants failed to argue that they were entitled to a pretrial, post-restraint hearing.

On its own initiative, however, the court posed the question the defendants had never asked: whether, after issuing the warrants, the district court should have held a pretrial hearing to determine whether the application for the warrants authorizing the seizures was supported by probable cause. The court then answered its own question by stating that under the Sixth Amendment speedy-trial standard of *Barker v. Wingo,* a pretrial evidentiary hearing was not required.[6] The court's answer constituted pure dicta, as the question was never raised by any party, was unnecessarily injected into the case by the court itself, and was therefore unnecessary to the resolution of the *Bissell* defendants' appeals.[7]

Fin. Inv. Group, Inc. v. Hammer, 393 F.3d 1223, 1226 (11th Cir. 2004)); *Mills v. Singletary,* 63 F.3d 999, 1008 n.11 (11th Cir. 1995) ("The law in this circuit is clear that arguments not presented in the district court will not be considered for the first time on appeal."); *Lancaster v. Newsome,* 880 F.2d 362, 371 (11th Cir. 1989); *Stephens v. Zant,* 716 F.2d 276, 277 (5th Cir. 1983) (per curiam).

[6] Since the court recognized that the defendants had never asked the district court for a hearing, one could interpret its application of the *Barker v. Wingo* standard as a statement that a district court is required to consider whether to hold a pretrial hearing even though the defendant does not request a hearing. There is no basis for this interpretation.

[7] A reading of the *Bissell* opinion clearly demonstrates that the court did not entertain the question and answer it under the rubric of the plain error doctrine. *See United States v. Evans,*

(Continued on following page)

II.

If we acknowledge that *Bissell*'s discussion of the issue at hand is dicta, we are left with no binding precedent on the question of whether a criminal defendant standing in the Kaleys' shoes is entitled as a matter of due process to a post-restraint hearing prior to trial.[8] In the absence of binding precedent, the panel should have looked to the general requirements of procedural due process. *See United States v. E-Gold Ltd.*, 521 F.3d 411, 415 (D.C. Cir. 2008) (using this approach to determine whether a post-restraint, pretrial hearing was due). The court's approach today,

---

478 F.3d 1332, 1338 (11th Cir. 2007) (finding that defendant's due process argument was subject to plain error review because it was not raised before the district court).

[8] In *United States v. Monsanto*, 491 U.S. 600, 603-06, 109 S. Ct. 2657, 2660-61, 105 L. Ed. 2d 512 (1989), the Supreme Court explicitly sidestepped this question. In that case, the Government, *ex parte*, obtained a pre-trial order restraining the defendant's purportedly forfeitable assets. The defendant moved to vacate the order, and the district court heard the motion in a four-day evidentiary hearing. The district court found probable cause for restraining the defendant's assets and thus upheld the order. The defendant then took an interlocutory appeal, which worked its way to the United States Supreme Court. The Court upheld the validity of the restraining order, holding that "assets in a defendant's possession may be restrained in the way they were here based on a finding of probable cause to believe that the assets are forfeitable." *Monsanto*, 491 U.S. at 615; 109 S. Ct. at 2666. It declined "to consider whether . . a hearing was required by the Due Process Clause" because the district court had held an extensive post-restraint hearing on the issue. *Id.* at 615 n.10, 109 S. Ct. at 2666 n.10.

following the dicta in *Bissell,* contravenes these principles.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'" upon the deprivation of liberty or property. *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965)). This basic statement of due process requires different measures in different contexts. *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 313, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950) (holding that due process requires a hearing "appropriate to the nature of the case"). In any particular context, three factors are relevant to the question of what constitutes a meaningful hearing:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335, 96 S. Ct. at 903.

Under ordinary circumstances, the private interest weighs heavily enough to require the government to provide notice and some sort of hearing prior to the deprivation. *United States v. James Daniel Good Real Property,* 510 U.S. 43, 53, 114 S. Ct. 492, 501, 126 L. Ed. 2d 490 (1993) (civil forfeiture); *Fuentes v. Shevin,* 407 U.S. 67, 82, 92 S. Ct. 1983, 1994-95, 32 L. Ed. 2d 556 (1972) ("Although . . due process tolerates variances in the form of a hearing appropriate to the nature of the case, . . . the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.") (quotation omitted). In *Fuentes,* for example, the Court struck down a state law that allowed creditors, *ex parte,* to obtain a prejudgment writ ordering the sheriff to seize a debtor's goods. The law failed because it did not afford the debtor notice and a hearing prior to the seizure. *Fuentes,* 407 U.S. at 83, 92 S. Ct. at 1995, 92 S. Ct. 1995; *see also Wolff v. McDonnell,* 418 U.S. 539, 557-58, 94 S. Ct. 2963, 2975, 41 L. Ed. 2d 935 (1974) ("[S]ome kind of hearing is required at some time before a person is finally deprived of his property interests."); *Connecticut v. Doehr,* 501 U.S. 1, 18, 111 S. Ct. 2105, 2116, 115 L.Ed.2d 1 (1991) (requiring prior notice and a hearing in the absence of "exigent circumstance[s]").

In extraordinary situations, notice and a hearing may be postponed until after the deprivation. *Good Real Property,* 510 U.S. at 53, 114 S. Ct. at 501 ("We tolerate some exceptions to the general rule requiring

predeprivation notice and hearing, but only in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.") (quotations omitted). In *Mitchell v. W.T. Grant,* 416 U.S. 600, 611, 94 S. Ct. 1895, 1902, 40 L. Ed. 2d 406 (1974), for example, the Court distinguished *Fuentes* and upheld a statute allowing creditors to sequester the goods of delinquent debtors without affording them prior notice and a hearing. Under the statute in *Mitchell,* to sequester the goods, a creditor could file an *ex parte* application with a judge showing that the delinquent debtor had the power to "conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action." *Id.* at 605, 94 S. Ct. at 1899 (quoting La. Code Civ. Proc. Ann. art. 3571). If satisfied with the showing, the judge would then issue a writ of sequestration. *Id.* at 605-06; *see also Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 679-80, 94 S. Ct. 2080, 2089-90, 40 L. Ed. 2d 452 (1974) (allowing postponement of notice and a hearing until after the seizure of a yacht in part because pre-seizure notice might have prompted the defendant to destroy, conceal, or remove the property).

If postponed, however, notice and a hearing must be given immediately after the deprivation. *See Mitchell,* 416 U.S. at 606, 94 S. Ct. at 1899. Under the statute upheld in *Mitchell,* a creditor could obtain a writ of sequestration based on an *ex parte* judicial determination, but the debtor, afterwards, could

"*immediately* . . . seek dissolution of the writ." *Id.* (emphasis added). Similarly, in *Barry v. Barchi,* 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979), the Court struck down a statute allowing the New York State Racing and Wagering Board to postpone notice and a hearing until an unspecified time after the suspension of a horse racing license. It held that the provision for delaying the administrative hearing "neither on its face nor as applied in this case, assured a prompt proceeding and prompt disposition of the outstanding issues." *Barchi,* 443 U.S. at 66, 99 S. Ct. at 2650.

These constitutional principles are mirrored in the framework of Rule 65 Federal Rules of Civil Procedure. Rule 65 provides that, under ordinary circumstances, courts have discretion to order a certain course of action by issuing a preliminary injunction only after affording the "adverse party" notice and a hearing.[9] Prior notice and a hearing are required even if the hearing will be duplicative of the

---

[9] In noting the similarities between the due process requirement of a prompt post-restraint hearing and Rule 65, I do not adopt the view that due process necessarily requires Rule 65 compliance. *See United States v. Holy Land Foundation for Relief and Development,* 493 F.3d 469, 473-76 (5th Cir. 2007) (en banc); *but see United States v. Roth,* 912 F.2d 1131, 1133 (9th Cir. 1990) ("[I]n order for a restraining order under [21 U.S.C.] § 853 to be constitutional, the district court must hold a hearing under Rule 65."). I refer to Rule 65 only to underscore the point that in those exceptional cases where notice and a hearing are delayed until after the restraint occurs, the hearing ought to be conducted as promptly as possible.

issues to be litigated at trial. *See* Fed. R. Civ. P. 65(a)(2).

In extraordinary situations, Rule 65, like the Due Process Clause, provides an exception to the general rule of prior notice and a hearing. Rule 65 provides that a temporary restraining order ("TRO") may be granted without notice, but only if the party requesting the order can offer specific facts clearly showing that "immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition." Fed. R. Civ. P. 65(b)(1)(A). TROs are "designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction." 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure: Civil* § 2951, at 253 (2d. ed. 1995).

Consistent with due process, Rule 65 requires a prompt post-restraint hearing when a TRO is granted. TROs expire after a fixed period of time set by the court that can be no longer than ten days. Fed. R. Civ. P. 65(b)(2). Immediately after the TRO is granted, therefore, the applicant must move for a preliminary injunction, which requires prior notice and a hearing. Fed R. Civ. P. 65(a); *see* Fed. R. Civ. P. 65(b)(3). Unless notice and a hearing are afforded within the ten-day period, the TRO will expire.

Congress also recognized these norms in those parts of the criminal forfeiture statute that regulate protective orders entered prior to the return of an

indictment, 21 U.S.C. § 853.[10] Before the indictment is returned, § 853 authorizes the court to restrain property only "after notice to persons appearing to have an interest in the property and opportunity for a hearing." § 853(e)(1)(B). At the hearing, before it issues the restraint, the court must determine that "there is a substantial probability that the United States will prevail on the issue of forfeiture." § 853(e)(1)(B)(i). Section 853, like Rule 65, allows this hearing to be delayed until after the restraint occurs only in exceptional cases. When an indictment has not yet been returned, the court may enter a temporary restraining order without notice or opportunity for a hearing "if the United States demonstrates that there is probable cause to believe that . . . provision of notice will jeopardize the availability of the property for forfeiture." § 853(e)(2). Even in these rare cases, however, the hearing must be held within ten days of the restraint, or the restraint will expire: "[s]uch a temporary order shall expire not more than ten days after the date on which it is entered. . . . A hearing requested concerning [a TRO] shall be held at the earliest possible time and prior to the expiration of the temporary order." *Id.*

In those parts of the criminal forfeiture statute that regulate protective orders entered following the return of an indictment, however, Congress was silent

---

[10] Section 853 speaks to the return of an indictment or the filing of an information. I refer here only to indictments.

as to whether the defendant is entitled to a post-restraint hearing prior to trial. *See id.* § 853(e)(1)(A). I apply the general due process requirements discussed above to determine that the Constitution requires that such a hearing be held in this context.

III.

In general, then, once property has been seized or restrained by a court order, the property owner must, at minimum, be given notice of the seizure or restraint and a prompt hearing. The Government argues for a departure from this general rule in cases like this one, where the court restrains property subject to forfeiture in a criminal case. The Government argues that, in these cases, a hearing on the propriety of the restraint may be delayed until the criminal case comes to trial. To determine whether the Kaleys' case justifies a departure from the general requirement of a prompt post-restraint hearing, I examine the three relevant interests that have been set out by the Supreme Court: (1) the private interest in a prompt hearing, (2) the risk of an erroneous deprivation without a prompt hearing, and (3) the government interest in delaying the hearing until trial. *See Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976) (the "*Mathews* factors").

First, the Kaleys have a private interest in using their property that is akin to the private interests in *Mitchell* and *Fuentes.* In those cases, a creditor

alleged an interest in the delinquent debtor's property and wished to freeze that property before the parties' rights could be adjudicated. *See Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 601-02, 94 S. Ct. 1895, 1897, 40 L. Ed. 2d 406 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 69-70, 92 S. Ct. 1983, 1988-89, 32 L. Ed. 2d 556 (1972). The only difference here is that the Government, rather than a private creditor, asserts the interest. In both *Mitchell* and *Fuentes*, the Court noted that, even though the status of the property was contested, the defendant retained an interest,[11] and due process therefore required a prompt hearing on the propriety of the deprivation. *Mitchell*, 416 U.S. at 606-07, 94 S. Ct. at 1899-1900 (holding that a statute entitling the defendant to an immediate hearing following issuance of a writ of sequestration "effect[ed] a constitutional accommodation of the

---

[11] Our decision in *United States v. Bailey*, 419 F.3d 1208 (11th Cir. 2005), further affirms that criminal defendants retain an interest in forfeitable property. Prior to *Bailey*, some courts had held that potentially forfeitable assets vest in the government immediately upon commission of the act giving rise to the forfeiture. Under such a rule, the government takes all right and title to forfeitable assets even before investigation and indictment of the criminal defendant. *Bailey* clarified that there is no "unheard-of provision for immediate, undecreed, secret vesting of title in the United States." *Bailey*, 419 F.3d at 1213 (quoting *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 134, 113 S. Ct. 1126, 1140, 122 L. Ed. 2d 469 (1993) (Scalia, J. concurring in the judgement)). Under *Bailey*, potentially forfeitable assets listed in the forfeiture count do not vest in the government until they are actually forfeited upon conviction or court order. *See id.*

conflicting interests of the parties"); *Fuentes,* 407 U.S. at 81-82, 92 S. Ct. 1994-95 (holding that the defendant's property interest requires a pre-seizure hearing).

The Kaleys also have an additional private interest in a prompt hearing that is not present in the civil context because, as a result of the protective order, they cannot use their assets to employ their preferred attorneys. The protective order therefore implicates their Sixth Amendment right to counsel of choice. The right to counsel of choice, while not absolute, is not satisfied merely because the defendant is able to retain adequate substitute counsel. It protects a criminal defendant's ability to hire the particular lawyer he prefers. *United States v. Gonzalez-Lopez,* 548 U.S. 140, 146, 126 S. Ct. 2557, 2562, 165 L. Ed. 2d 409 (2006) ("[T]he Sixth Amendment right to counsel of choice . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided – to wit, that the accused be defended by the counsel he believes to be best."). In this case, therefore, it is irrelevant from a Sixth Amendment point of view that the Kaleys have $270,000 in unrestrained assets with which to hire less expensive counsel. What matters is that, without access to the property covered by the protective order, the Kaleys are unable to retain their preferred attorneys, Howard Srebnick and Susan Van Dusen.

Delaying the due process hearing until trial will only temporarily deprive the Kaleys of their property rights, but it will completely eviscerate their right to

counsel of choice. After the verdict is handed down, of course, the Kaleys will no longer need to retain Srebnick and Van Dusen. "While the [Sixth Amendment] deprivation is nominally temporary, it is 'in that respect effectively a permanent one.' 'The defendant needs the attorney *now* if the attorney is to do him any good.'" *United States v. E-Gold, Ltd.*, 521 F.3d 411, 417-18 (D.C. Cir. 2008) (quoting *United States v. Monsanto*, 924 F.2d 1186, 1193 (2d Cir. 1991) (en banc); *United States v. Moya-Gomez*, 860 F.2d 706, 726 (7th Cir. 1988)) (emphasis in original). The Sixth Amendment interest, for that reason, weighs heavily in the balance.

I next analyze the second factor, the risk of an erroneous deprivation without an immediate hearing. In this case, prosecutorial incentives increase the likelihood of an erroneous deprivation in the absence of a prompt hearing. A prosecutor has everything to gain by restraining assets that ultimately may not be forfeited. By doing so, he can stack the deck in the government's favor by crippling the defendant's ability to afford high-quality counsel. If the prosecutor can delay judicial oversight of the restraint until trial, he also has nothing to lose, as he does not have to dedicate any extra resources to defending his decision.

Also relevant to the risk of an erroneous deprivation is "the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335, 96 S. Ct. at 903. In this case, without a prompt hearing, probable cause rests, initially, on the

grand jury having found probable cause before returning the indictment and, then, on the district court's finding of probable cause, both of which findings were made on the Government's *ex parte* showing.[12] Neither procedure significantly reduced the risk of an erroneous deprivation. In grand jury proceedings, the government may rely, even entirely, on "read-backs and hearsay witnesses," *United States v. Waldon,* 363 F.3d 1103, 1109 (11th Cir. 2004) (per curiam), or illegally acquired evidence, *United States v. Calandra,* 414 U.S. 338, 344-45, 354-55, 94 S. Ct. 613, 618, 623, 38 L. Ed. 2d 561 (1974).[13] The government has no duty to disclose exculpatory evidence to the grand jury, *United States v. Williams,* 504 U.S. 36, 112 S. Ct. 1735, 118 L. Ed. 2d 352 (1992), and the defendant has no right to testify or even appear, *see* Fed. R. Crim. P. 6(d)(1). The grand jury, then, is not a mechanism well designed to protect a defendant against an erroneous deprivation.

The district court's finding is slightly more reliable than the grand jury's. It was, however, made upon an *ex parte* showing; the Kaleys had no opportunity to

---

[12] In some cases, the court may treat the indictment, standing alone, as establishing probable cause. The magistrate judge did that here. It was only after the Kaleys moved the court to vacate the protective order that the magistrate judge required the prosecutor to present, *in camera,* independent proof of probable cause.

[13] The government may even rely on testimony that turns out to be perjured. *See Anderson v. Sec'y for the Dep't. of Corr.,* 462 F.3d 1319, 1326-27 (11th Cir. 2006) (per curiam).

challenge the Government's showing. In this sense, the court's probable cause finding is comparable to the *ex parte* judicial determination in *Mitchell. See Mitchell,* 416 U.S. at 606, 94 S. Ct. at 1899 (describing a statute that allowed a judge to issue a writ of sequestration upon a creditor's *ex parte* application). Here, as in that case, the *ex parte* determination is insufficient to justify delaying the post-restraint hearing for long after the restraint is imposed. *See id.* at 618, 94 S. Ct. at 1905 (stressing that, after the deprivation, the debtor is entitled to an immediate hearing).

Finally, I examine the Government's interest. Citing the legislative history of the forfeiture statute, the Government asserts that:

> requiring the government to prove the merits of the underlying criminal case and forfeiture pretrial would make obtaining a restraining order too difficult and would make pursuing such an order inadvisable from the government's standpoint because of the potential for damaging premature disclosure of the government's case and trial strategy, as well as jeopardizing the safety of witnesses and victims.

Gov't. Br. at 31. Although these are certainly legitimate interests, the Government overlooks the fact that the party challenging the restraint bears the burden of convincing the court that probable cause is lacking. This is true whether the defendants challenge a seizure made pursuant to a § 853(f) warrant

via a motion filed pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure, as they could have in *Bissell*, or a restraint affected pursuant to a § 853(e) protective order via a motion to vacate the order.

The *Mathews* factors, on balance, do not justify an exception to the settled minimum due process requirement of a prompt post-restraint hearing. Accordingly, the Kaleys are entitled to a pretrial hearing on the merits of the protective order.[14] This court should therefore have reversed and remanded to the district court with instructions to afford the

---

[14] The majority of our sister circuits that have considered the issue are in accord. *See E-Gold*, 521 F.3d at 419 (requiring a post-restraint, pretrial hearing when the defendant needs the assets to meaningfully exercise the right to counsel); *Monsanto*, 924 F.2d at 1203 (same); *Moya-Gomez*, 860 F.2d at 728-29 (same); *United States v. Lewis*, 759 F.2d 1316, 1324-25 (8th Cir. 1985) (same with respect to restraining orders issued pursuant to 21 U.S.C. § 848); *United States v. Crozier*, 777 F.2d 1376, 1383-84 (9th Cir. 1985) (noting due process requirement of a post-restraint hearing in cases involving § 853 orders); *see also United States v. Melrose East Subdivision*, 357 F.3d 493, 499 (5th Cir. 2004) (noting the "broad agreement that due process requires the district court to hold a prompt hearing at which the property owner can contest the restraining order – without waiting until trial to do so – at least when the restrained assets are needed to pay for an attorney"); *cf. United States v. Long*, 654 F.2d 911, 915 (3rd Cir. 1981) (rejecting due process challenge to restraining order issued pursuant to § 848 where order issued after hearing); *United States v. Farmer*, 274 F.3d 800, 803, 805-06 (4th Cir. 2001) (requiring a post-restraint, pretrial hearing but only where the defendant shows the restrained assets are untainted and necessary to secure counsel of choice); *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998) (same).

Kaleys a pretrial hearing at which they could show that the Government did not have probable cause to restraint their assets. Because the court mistakenly believes that it is bound by *Bissell,* however, the Kaleys may be deprived of this right. For these reasons, I specially concur.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-80021-CR-MARRA/HOPKINS

UNITED STATES
OF AMERICA,

v.

KERRI L. KALEY and
BRIAN P. KALEY, *et al.*,

DEFENDANTS. /

OPINION AND ORDER AFFIRMING IN PART AND REVERSING IN PART ORDER OF MAGISTRATE JUDGE AND OVERRULING IN PART AND SUSTAINING IN PART OBJECTIONS TO ORDER DENYING DEFENDANTS' MOTION TO VACATE PROTECTIVE ORDER

(Filed Jun. 25, 2007)

This matter is before the Court on the appeal and objections filed by Defendants Kerri L. Kaley and Brian P. Kaley to the order entered by Magistrate Judge James M. Hopkins that denied their motion to vacate the protective order which restrained their use of certain property and which denied their motion for an evidentiary hearing on whether the pretrial restraint of the property should remain in place pending a trial. DE 82. The Court has considered the arguments of the parties and has conducted a *de novo* review of the record. Upon the Court's *de novo* review

of the record, it is hereby ORDERED AND ADJUDGED as follows:

I. PROBABLE CAUSE AND A POST-RESTRAINT EVIDENTIARY HEARING:

The Court has conducted a *de novo* review of the Declaration[1] submitted by the United States to support a finding of probable cause that, among other things, the property subject to the protective order, namely Defendants residence and a certificate of deposit which was obtained from an equity line of credit based upon Defendants' ownership interest in their residence,[2] constitutes property "involved in" the money laundering offense charged in the superceding indictment, and constitutes "property traceable to such property." *See* Superceding Indictment, Count 7, Criminal Forfeiture Count (DE 44); 18 U.S.C. § 982(a)(1). The Court affirms the Magistrate Judge's determination, and independently finds, that the United States has demonstrated probable cause to believe that Defendants' residence was "involved in"

---

[1] DE 77 (under seal)

[2] As will be discussed more fully below, the Court concludes that the record evidence supports Defendants' appeal and objection to the Magistrate Judge's order to the extent it failed to exclude from the protective order $63,007.65 of "untainted" funds which were incorporated into the certificate of deposit. Through no fault of the Magistrate Judge, the most compelling evidence supporting Defendants' position relative to these funds was not submitted to the Court until June 13, 2007, after the Magistrate Judge entered his ruling. DE 119, 120 (under seal)

the money laundering offense charged in the superceding indictment, and that all but $63,007.65 of the funds used to obtain the certificate of deposit are "traceable to" the residence.

Because there exists probable cause to believe that the property in question was "involved in" money laundering activity or is "traceable to such property", the protective order has been properly entered. Defendants seek a post-restraint evidentiary hearing to challenge the propriety of the protective order and its scope. Defendants assert that the government must show, in an evidentiary hearing, the amount of proceeds from the allegedly stolen prescription medical devices that can be traced to their residence and the certificate of deposit. Because the United States is now proceeding with its forfeiture claim, in part, under 18 U.S.C. § 982(a)(1)[3], and not solely under 18 U.S.C. § 981(a)(1)(C),[4] whether the property restrained in this case constitutes or is derived from proceeds of the allegedly stolen prescription devices is not of critical importance. So long as there is probable cause to believe that the property was used in the money laundering offense or that the property is

---

[3] In imposing sentence on a person convicted of money laundering under 18 U.S.C. § 1956, the court shall order forfeiture of any property "involved in such offense, or any property traceable to such property."

[4] Property "which constitutes or is derived from proceeds traceable to a violation" of certain criminal statutes is subject to forfeiture.

traceable to property used in the money laundering offense, which is the case here, the restrained property is not outside the scope of the indictment. The only purpose for granting Defendants an evidentiary hearing under the present circumstances would be to permit them to challenge the underlying merits of the indictment. As the court in *United States v. Bissell*, 866 F.2d 1343, 1349 (11th Cir. 1989), stated, in a post-restraint hearing, the defendants "may not challenge the validity of the indictment itself and thus require that the government present its evidence before trial."[5]

In view of the foregoing, the Court affirms the Magistrate Judge's finding of probable cause and his

---

[5] As previously discussed, the United States has demonstrated that probable cause exists to believe that Defendants' residence was "involved in" the money laundering charge asserted in the indictment. It appears to be undisputed that with the exception of $63,007.65, the certificate of deposit is "traceable to" Defendants' residence. Hence, in the post-restraint proceedings that have taken place thus far, Defendants have had the opportunity, and have successfully demonstrated, that some of the restrained property is "outside the scope of the indictment." Other than a challenge to the validity of the indictment itself, or Defendants' assertion of the need to trace proceeds from the sale of the allegedly stolen prescription medical devices to the restrained property, which is no longer required, there is no suggestion or indication that any property other than the $63,007.65 is "outside the scope of the indictment." Hence, with the exception of the constitutional challenges made by Defendants, which will be discussed below, no legally permissible purpose would be served by having a post-restraint evidentiary hearing.

conclusion that a post-restraint evidentiary hearing to determine whether the government "wrongfully restrained specific assets which are outside the scope of the indictment" is not required. *See Bissell*, 866 F.2d at 1349. The Court reverses and sustains Defendants' objections to the Magistrate Judge's failure to release from the scope of the protective order $63,007.65 of funds which the record evidence has sufficiently demonstrated were not used in the money laundering offense charged in the superceding indictment or traceable to such property and which the record evidence has failed to show constitute or is derived from proceeds traceable to a criminal violation asserted in the superceding indictment.

II. DEFENDANTS' SIXTH AMENDMENT CLAIM:

The Court affirms and overrules Defendants' objections to the Magistrate Judge's finding that Defendants' Sixth Amendment right to counsel of their choice has not been violated by the pretrial restraint of property which they wish to use to retain counsel. The Court also affirms the Magistrate Judge's determination that there has been no showing of prosecutorial bad faith or vindictiveness. As the Magistrate Judge noted, the court in *Bissell* stated that:

> But where, as here, no prosecutorial bad faith is evident, and the district court has made a determination of probable cause, either on its own or upon the grand jury's return of the indictment, there has been

> no improper denial of defendant's Sixth Amendment right to counsel of choice.

Bissell, 866 F.2d at 1355. This holding is precisely applicable to the present case. This Court has found probable cause to restrain Defendants' assets and there is no showing of prosecutorial bad faith or vindictiveness. The fact that the defendants in *Bissell* did not contend that the government wrongfully restrained non-forfeitable assets, and Defendants in this have made that assertion, is not material. This Court's independent determination of probable cause to believe that the restrained assets fall within the ambit of the superceding indictment's forfeiture count is a sufficient check on the government to pass Sixth Amendment scrutiny. *Bissell,* 866 F.2d at 1354-55.

III. DEFENDANTS' DUE PROCESS CLAIM:

Defendants contend that the failure of the Court to conduct a post-restraint evidentiary hearing to allow them to challenge the propriety of the protective order derives them of due process. Defendants assert that the Magistrate Judge erred in failing to evaluate the factors the court in *Bissell* determined were appropriate for a due process analysis. While the Magistrate Judge did not expressly analyze the factors, a rejection of Defendants' contention is implicit in his order. In any event, this Court, upon a *de novo* review of the record, concludes that Defendants' right to due process has not been violated.

In *Bissell,* the court addressed the defendants' contention that an immediate post-restraint hearing relative to the validity of a government seizure of allegedly forfeitable assets was required by due process. In evaluating the need for a hearing, the court concluded that it was necessary to weigh the four factors of (1) length of the delay in conducting a hearing; (2) the reason for the delay; (3) the defendant's assertion of his right to a hearing and (4) the prejudice to the defendant in not conducting a hearing. *Bissell,* 866 F.2d at 1352.[6]

As for the length of the delay, the *Bissell* court found eight months between the initial restraint and the trial on the merits to not be significant. *Id.* at 1353. But for the delays that have resulted from Defendants' challenge to the pre-trial restraints, this case would have been set for trial. Even with the delays attendant to these post-restraint proceedings, this Court can try this case within the eight months the *Bissell* court found "not significant." The delay factor weighs against Defendants.[7]

---

[6] The test was adopted from the case of *Barker v. Wingo,* 407 U.S. 514, 530 (1972), which the United States Supreme Court utilized in a civil forfeiture proceeding challenging on due process grounds the delay between a seizure of currency and a civil forfeiture trial. *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) In United States Currency,* 461 U.S. 555 (1983).

[7] Defendants' counsel of choice have only entered a limited appearance in this case. Defendants are hoping these post-restraint proceedings will free-up sufficient funds to allow the

(Continued on following page)

As to the reason for delaying a hearing, the *Bissell* court noted Congress' concern that in criminal cases, the government not be required to prove the underlying criminal case and forfeiture counts in advance of trial in order to restrain property alleged to be forfeitable in an indictment. The *Bissell* court found these concerns justifiable reasons for delaying a hearing on the merits of the governments case until trial, "particularly in light of the government's compelling regulatory interest in preventing crime." *Id.* Contrary to Defendants' assertion, these reasons are not applicable only in cases involving racketeering and narcotics trafficking or where there is concern for the safety of witnesses. Preventing challenges to the validity of the indictment in advance of trial is a legitimate concern in all criminal cases. *See Bissell*, 866 F.2d at 1349 (at a post-restraint hearing the defendant "may not challenge the validity of the indictment itself and thus require the government to present its evidence before trial.") As discussed previously, at this juncture, the only purpose for a post-restraint evidentiary hearing would be to challenge the validity and merits of the indictment. Thus, the

---

entry of a permanent appearance in the case by their counsel of choice. Defendants have indicated that they will appeal this order to the Eleventh Circuit Court of Appeals, which *may* cause additional delays in getting this case to trial. While Defendants have every right to challenge the pre-trial restraints and pursue all available appellate remedies, to the extent they do so unsuccessfully, they should not be heard to complain on due process grounds about delays attributable to their actions.

reason for the delay weighs in favor of the government and against Defendants.

The third factor to be weighed is Defendants' assertion of a right to a hearing. While Defendants have done so in this case, that fact does not end the inquiry. As the *Bissell* court noted, the purpose of a post-restraint hearing is "to determine whether legitimate assets-those *outside the scope of the indictment*-have been wrongfully restrained." *Id.* at 1353 (emphasis added). In the present case, based upon the money laundering charge and this Court's probable cause determination, the only way Defendants could demonstrate that the restrained assets, other than the $63,007.65 that is being released by this order, are outside the scope of the indictment is to challenge its validity on the merits. As has been seen previously, such a challenge cannot be made pretrial. At best, the third factor is in equipoise.

The fourth factor is prejudice to Defendants resulting from the absence of a post-restraint hearing. As the *Bissell* court noted, a wrongful deprivation of Defendants' legitimate assets will severely impair their defense, coming back full circle to Defendants' Sixth Amendment right to counsel of their choice. *Id.* at 1354. In analyzing this factor, it was recognized that the court cannot simply look to the interests of the criminal defendant. Rather, the claim and interests of the government to the property must also be considered. In view of these competing interests, the court concluded that judicial control of the process provides a "significant check on the government's

power to restrain legitimate, nonindicted assets." *Id.* Hence, a district court's probable cause determination, as is present here, diminishes the prejudicial effect of the pretrial restraint. When all four factors are weighed in this case, the Court concludes that Defendants have not been denied due process by the absence of a post-restraint evidentiary hearing.

IV. *EX POST FACTO* CHALLENGES.

The Court affirms and overrules Defendants' objections to the Magistrate Judge's conclusion that the pretrial restraint effected in this case does not violate the *ex post facto* provision of the United States Constitution. Moreover, even assuming that Defendants' arguments that the statutory changes in question are deemed substantive rather than procedural, it would not alter the result. Defendants are charged with money laundering under 18 U.S.C. § 1956 and the criminal forfeiture count is based, in part, on 18 U.S.C. § 982(a)(1). As a result, pretrial restraint was authorized through 21 U.S.C. § 853(e)(1). *See* 18 U.S.C. § 982(b)(1); *United States v. Razmilovic,* 419 F.3d 134, 139-40 (2d Cir. 2005). The ability to impose pretrial restraints on property "involved in" money laundering or property "traceable to such property" existed during the period the alleged conspiracy was in existence. Under such circumstances, there is no *ex post facto* violation. *United States v. Hersh,* 297 F.3d 1233, 1244-45 (11th Cir. 2002).

V. CONCLUSION.

Based upon all of the foregoing, the Magistrate Judge's Order is affirmed in all respects, and Defendants' objections are all overruled, except that Defendants' objection to $63,007.65 being subject to the protective order, which funds have been transferred into the certificate of deposit, is sustained and the Magistrate Judge's Order is reversed in this one respect.* Therefore, $63,007.65 shall be released to Defendants from the protective order. The remainder of the restrained property shall continue to be subject to the protective order pending further order of the Court.

Done and ordered in Chambers in West Palm Beach, Palm Beach County, Florida, this 25th day of June, 2007.

/s/ [Illegible]
KENNETH A. MARRA
UNITED STATES
DISTRICT JUDGE

---

* The Court notes that the United States agrees that the Magistrate Judge made an error in calculating the number of hours Defendants' counsel claim they need to prepare to try this case. The Magistrate Judge neglected to include 400 hours of associate time in the equation. In the event this error is determined to be relevant to any judicial determination, the Court acknowledges the error and the government's recognition of it.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 07-80021-Cr-Marra/Hopkins

UNITED STATES
OF AMERICA,

vs.

KERRI L. KALEY and
BRIAN P. KALEY, *et al.*,

Defendants.
_____/

ORDER DENYING DEFENDANTS KERRI AND BRIAN KALEY'S CONSOLIDATED MOTION TO VACATE THE PROTECTIVE ORDER AND FOR A HEARING CONCERNING THE PROTECTIVE ORDER [DE 17] AND TO BAR PRETRIAL RESTRAINTS ON A "FACILITATION" THEORY [DE 52]

(Filed May 2, 2007)

This cause is before the Court on Orders of Referral. [DEs 28, 71]. Defendants Kerri and Brian Kaley have moved to Vacate the Protective Order and for a Hearing [DE 17] and to Bar Pretrial Restraints on a "Facilitation" Theory. [DE 52]. Defendants' motions are denied as indicated below.

PROCEDURAL POSTURE OF THE CASE

On February 6, 2007, a federal grand jury returned an indictment against defendants charging

that they conspired, from approximately January 1995 through on or about February 15, 2005, to transport stolen property and to obstruct FDA proceedings. [DE 1]. The indictment also charged defendants with substantive interstate transportation of stolen property and obstruction of justice. [DE 1]. A criminal forfeiture count seeking the proceeds of defendants' interstate transportation of stolen property including a money judgment in the amount of $2,195,635.28 and a certificate of deposit which had been collateralized by the defendants' primary residence was included in the Indictment [DE 1].

On February 7, 2007, the United States moved *ex parte* for a protective order based on the grand jury's determination of probable cause [DE 5], which motion was granted. [DE 6]. The United States, separate and apart from the protective order, recorded a *lis pendens* against defendants' primary residence in New York.

On March 5, 2007, Defendants moved to vacate the protective order, in whole or in part, and for a hearing alleging (1) defendants cannot retain their counsel of choice as the protective order precludes them from using the certificate of deposit for their fees, (2) that the *lis pendens* prevents them from using the equity in their home to pay legal fees, and (3) that the protective order is vague, over-broad, and violates their Fifth Amendment and Sixth Amendment rights as well as their rights against *ex post facto* increase of punishment. [DE 17].

On April 6, 2007, a status conference on the Protective Order issues was convened. The United States asserted that the *lis pendens* restraint on the principal residence was justified since they had traced $140,000 in proceeds into the residence and since the Mandatory Victim Restitution Act of 1996, 18 U.S. C. Section 3663A, required them to consider the restitution rights of the victims in their charging decisions. Moreover, the United States advised the Court that a hearing could be rendered moot if the United States presented a Superseding Indictment including money laundering as well as money laundering forfeiture.

On April 10, 2007, the grand jury returned a Superseding Indictment encompassing a money laundering charge and money laundering forfeiture, which included the certificate of deposit and the principal residence for forfeiture as proceeds or involved in the criminality. (DE 44).

On April 17, 2007, the Defendants filed an Outline of Remaining Issues (DE 53) and on April 19, 2007, the United States filed its Response. (DE 57).

On April 17, 2007, the Defendants also filed a Motion to Bar Pretrial Restraints on a "Facilitation" Theory. (DE 52). On April 24, 2007, the United States filed its Response (DE 68) and on April 26, 2007, the Defendants filed their Reply. (DE 69).

On April 27, 2007, a hearing was held on the outstanding motions pertaining to the pretrial restraints.

On May 1, 2007, the United States submitted a probable cause affidavit in relation to the certificate of deposit and the principal residence. The undersigned found probable cause and signed a Restraining Order in relation to those assets.

ANALYSIS

The Defendants assert that a pretrial hearing on the propriety of the Government's restraint of their certificate of deposit and principal residence is necessary due to the consequent impediment to their ability to retain counsel of choice.

In *United States v. Bissell,* 866 F.2d 1343 (11th Cir. 1989), the Eleventh Circuit examined the issue of whether a defendant is entitled to a pre-trial hearing to determine the propriety of restrained assets. It noted that the district court retains authority to hold a post-restraint hearing where "the defendant may undertake to prove that the government wrongfully restrained specific assets which are outside the scope of the indictment, not derived from, or used in, criminal activity, but may not challenge the validity of the indictment itself and thus require that the government present its evidence before trial." *Id.* at 1349.

Where there is a challenge to the propriety of restrained assets being made unavailable for defendant to retain counsel of choice, the Eleventh Circuit stated that "where, as here, no prosecutorial bad faith is evident, and the district court has made a determination of probable cause, either on his own or upon

the grand jury's return of the indictment, there has been no improper denial of defendant's Sixth Amendment right to counsel of choice." *Id.* at 1355. In *Bissell,* the Government had submitted affidavits in support of probable cause before the district court made its probable cause determination. *Id* at 1354. The Eleventh Circuit found that such judicial control, where no prosecutorial bad faith is evident, was sufficient to ensure that there was no Sixth Amendment violation and no post-restraint hearing was necessary until trial. *Id.* at 1354-55.

In the instant case the Court has made a probable cause determination after reviewing the Government's affidavit in support of probable cause.

The Defendant's argue that the Government acted vindictively by superseding the Indictment after they alerted the Government to defects in the Indictment (failure to have the grand jury foreperson sign the Indictment and failure to include the principal residence as forfeitable property) with their motion to vacate. The Government responded that they were merely acting to correct their mistakes pretrial in order to protect their legitimate interests.

In *United States v. Barner,* 441 F.3d 1310 (11th Cir. 2006), the Eleventh Circuit declined to decide whether a presumption of vindictiveness could ever arise in a pre-trial setting, but directed the courts to evaluate whether the facts formed a "realistic likelihood of vindictiveness." *Id.* at 1317-18. In the instant case the Government was merely acting to correct a

defect in the Indictment in order to remove any appellate issues and to ensure that the defendants' forfeitable assets could be properly restrained. These are appropriate Government motives justifying the Superseding Indictment. As in *Barner*, there are no specific facts that show the pre-trial history of this case was so caustic that it could be presumed that the prosecutors acted improperly. *Id.* at 1320.

Moreover, the defendants at the April 27, 2007, hearing admitted that there was no evidence of actual vindictiveness on the part of the prosecutors. *Id.* at 1322.

Furthermore, the evidence at the April 27, 2007, hearing showed that the Defendants have $325,000-$350,000 currently available for retaining counsel, albeit by having to pay taxes and penalties on some of the funds available to be converted. While their counsels of choice are charging them $375,000 in up-front fees and $100,000 for expenses, competent counsel can readily be obtained for $325,000-$350,000. Their counsels of choice stated that they estimate working 400 hours each preparing for and handling the estimated 2-3 week trial. Even assuming that $100,000 is necessary for expenses, at least $225,000 would still be available for fees. Thus, they have sufficient funds to retain attorneys charging $280 per hour or less. The Court notes and the Defendants' temporary counsels agree that many competent attorneys choose to work on the Criminal Justice Act panel where they charge $90 per hour. This Court concludes that the Defendants' Sixth Amendment rights are not being

improperly compromised by the Government's court supervised pre-trial restraints.

The Defendants have also asserted other bases for alleged improper Government pre-trial restraint of assets. They contend that the Government has not shown that the funds were not traceable to or used in "thefts," the underlying criminal activity. However, participants in any post-restraint hearing cannot challenge the underlying forfeitability of property and thereby force the Government to present its evidence before trial. *Bissell* at 1349. In addition, the Court has found probable cause to support the restraints.

Defendants also claim that the pre-trial restraints violate the *ex post facto* clause on two grounds. First, they claim that the Government took advantage of a change in the law, that allowed pre-trial restraint of assets, enacted a year after their alleged crimes ended. Second, they assert that the law that allows the forfeiture of assets was enacted in the middle of the alleged conspiracy and thus permits punishment for crimes committed prior to the law's enactment.

As to the first ground, pre-trial restraints of forfeitable assets are merely "procedures by which the case is adjudicated, as opposed to changes in the substantive law of crimes." *Collins v. Youngblood,* 497 U.S. 37, 45 (1990); *United States v. Crozier,* 777 F.2d 1376, 1383 (9th Cir. 1985). Thus, the *ex post facto* clause is not implicated.

Secondly, for conspiracies a forfeiture penalty enacted during the course of the continuing offense does not violate the *ex post facto* clause. *United States v. Hersh,* 297 F.3d 1233, 1244 (11th Cir. 2002); *United States v. McHan,* 101 F.3d 1027, 1041 (4th Cir. 1996). Additionally, this motion may be premature and properly considered after conviction. *United States v. Sudeen,* 2002 WL 1897095 (E.D. La. 2002).

Wherefore, this Court **DENIES** Defendants Kerri and Brian Kaley's Motion to Vacate the Protective Order and for a Hearing [DE 17] and to Bar Pretrial Restraints on a "Facilitation" Theory. [DE 52].

DONE AND ORDERED in Chambers this 2 day of May, 2007 at West Palm Beach in the Southern District of Florida.

/s/ James M. Hopkins
JAMES M. HOPKINS
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-15048-DD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KERRI L. KALEY,
BRIAN P. KALEY,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(Filed Jul. 17, 2012)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: EDMONDSON and MARCUS, Circuit Judges, and FAWSETT,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having

---

* Honorable Patricia C. Fawsett, United States District Judge for the Middle District of Florida, sitting by designation.

requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-80021-CR-MARRA

UNITED STATES
OF AMERICA,

Plaintiff,

vs.

KERRI L. KALEY and
BRIAN P. KALEY,

Defendant. /

ORDER GRANTING MOTION TO STAY

(Filed Sep. 20, 2012)

THIS CAUSE is before the Court upon Defendants' Motion to Stay or Continue Arraignment Pending Disposition of Petition for Writ of Certiorari [DE 250]. This Court having reviewed the pertinent portions of the record and being duly advised in the premises, it is hereby

ORDERED and ADJUDGED as follows:

This case was indicted over five and one-half years ago. For approximately one and one-half of those years, the parties have been litigating before this Court the question of whether Defendants' assets have been restrained consistent with the requirements of due process. For approximately four of those years, this issue has been litigated before the United States Court of Appeals for the Eleventh Circuit.

Defendants want the restraint of their assets lifted so they can use them to retain counsel of their choice.

As the case presently stands, it has been determined that the restraint of Defendants' assets is consistent with the requirements of due process. Defendants disagree and want to exhaust their appellate remedies by seeking Supreme Court review of the most recent decision of the Eleventh Circuit Court of Appeals. Not surprisingly and understandably, the United States believes that after five and one-half years, it is time for the case to proceed to trial. Defendants seek a stay of the proceeding pending a determination by the Supreme Court as to whether it will review the decision of the Court of Appeals.

There is significant merit to the government's argument. However, the Court does not believe that the delay that has occurred in this case can be attributed to Defendants. Defendants have properly exercised their right to appellate review, and the [sic] they were vindicated in their first interlocutory appeal. The government has acknowledged that if the Supreme Court agrees to review the appellate decision, the case will once again have to be put on hold. In view of the extensive delay that has already occurred and the prospect that the case will once again have to be stayed if the Supreme Court grants review, this Court concludes that the equities weigh in favor of granting a stay for the relatively short additional period of time required for the Supreme Court to consider Defendants petition for review, rather than

possibly improperly forcing Defendants to defend the case without the benefit of the assets they claim are necessary to retain counsel of their choice.

In view of the foregoing, Defendants' Motion is GRANTED.

DONE and ORDERED in West Palm Beach, Florida, this 20th day of September, 2012.

/s/ [Illegible]
KENNETH A. MARRA
UNITED STATES
DISTRICT JUDGE

Copies provided to:

All counsel

OPPOSITION BRIEF

RECORD
AND
BRIEFS

FILED
FEB 13 2013
OFFICE OF THE CLERK

No. 12-464

In the Supreme Court of the United States

KERRI L. KALEY AND BRIAN P. KALEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
MICHAEL A. ROTKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Library of Congress
Law Library

QUESTION PRESENTED

Whether an indicted defendant who asserts that a pretrial order restraining potentially forfeitable assets impairs his ability to retain counsel of choice, and who has been afforded a post-restraint hearing, must be permitted to challenge the order by attacking the grand jury's determination of probable cause to indict the defendant on the offenses as to which forfeiture is sought.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Discussion 12
Conclusion 25

TABLE OF AUTHORITIES

Cases:

Bank of N.S. v. *United States*, 487 U.S. 250 (1988) 16
Barker v. *Wingo*, 407 U.S. 514 (1972) 8
Caplin & Drysdale, Chartered v. *United States*, 491 U.S. 617 (1989) 14
Costello v. *United States*, 350 U.S. 359 (1956) 10, 15
Gerstein v. *Pugh*, 420 U.S. 103 (1975) 16
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 23
Lawn v. *United States*, 355 U.S. 339 (1958) 16
Libretti v. *United States*, 516 U.S. 29 (1996) 2
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 8
United States v. *Bissell*, 866 F.2d 1343 (11th Cir.), cert. denied, 493 U.S. 876 (1989) 7, 8
United States v. *Calandra*, 414 U.S. 338 (1974) 16
United States v. *Celis*, 608 F.3d 818 (D.C. Cir.), cert. denied, 131 S. Ct. 620 (2010) 17
United States v. *Dejann*, 37 Fed. Appx. 870 (9th Cir. 2002) 22
United States v. *E-Gold, Ltd.*, 521 F.3d 411 (D.C. Cir. 2008) 12, 21, 22, 24
United States v. *$8,850*, 461 U.S. 555 (1983) 3, 8
United States v. *Farmer*, 274 F.3d 800 (4th Cir. 2001) 20

Cases—Continued: Page

United States v. *Gonzalez-Lopez*, 548 U.S. 140 (2006).....24
United States v. *Jamieson*, 427 F.3d 394 (6th Cir. 2005), cert. denied, 547 U.S. 1218 (2006).....20
United States v. *Jones*, 160 F.3d 641 (10th Cir. 1998).....20
United States v. *Long*, 654 F.2d 911 (3d Cir. 1981).....21
United States v. *Mechanik*, 475 U.S. 66 (1986).....24
United States v. *Michelle's Lounge*, 39 F.3d 684 (7th Cir. 1994).....22
United States v. *Monsanto*:
491 U.S. 600 (1989).....*passim*
924 F.2d 1186 (2d Cir.), cert. denied, 502 U.S. 943 (1991).....12, 17, 21
United States v. *Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988), cert. denied, 492 U.S. 908 (1989).....22
United States v. *Roth*, 912 F.2d 1131 (9th Cir. 1990).....12, 22
United States v. *Ruiz*, 536 U.S. 622 (2002).....17
United States v. *Ursery*, 518 U.S. 267 (1996).....2
United States v. *Williams*, 504 U.S. 36 (1992).....16
United States v. *Yusuf*, 199 Fed. Appx. 127 (3d Cir. 2006), cert. denied, 129 S. Ct. 2764 (2009).....20, 21
VMI v. *United States*, 508 U.S. 946 (1993).....23

Statutes and rules:

U.S. Const.:
Amend V (Due Process Clause).....14
Amend VI.....14
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.....3
18 U.S.C. 371.....5

Statutes and rules—Continued: Page

18 U.S.C. 981(a)(1)(C) 6
18 U.S.C. 982(a)(1) 6
18 U.S.C. 1512(b)(3) 5
18 U.S.C. 1956(c)(7) 6
18 U.S.C. 1956(h) 6
18 U.S.C. 1961(1) 6
18 U.S.C. 2314 ..... 2, 5, 6
21 U.S.C. 853 ..... *passim*
21 U.S.C. 853(a)(1) 3
21 U.S.C. 853(e)(1) 3
21 U.S.C. 853(e)(1)(A) 2, 4, 6, 13, 20
21 U.S.C. 853(e)(1)(B) 3
21 U.S.C. 853(e)(3) 3
28 U.S.C. 1292(a)(1) 24
28 U.S.C. 2461(c) 6
Fed. R. Crim. P.:
Rule 32.2 4
Rule 32.2(a) 5

Miscellaneous:

S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 4, 10, 11, 15

In the Supreme Court of the United States

No. 12-464

KERRI L. KALEY AND BRIAN P. KALEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-37) is reported at 677 F.3d 1316. A prior opinion of the court of appeals (Pet. App. 48-93) is reported at 579 F.3d 1246. The opinions of the district court and the magistrate judge (Pet. App. 38-47 and 94-112) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2012. A petition for rehearing en banc was denied on July 17, 2012 (Pet. App. 113-114). The petition for a writ of certiorari was filed on October 11, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2007, a federal grand jury in the Southern District of Florida returned a superseding indictment charging

petitioners with conspiracy and substantive offenses relating to the transportation of stolen goods in interstate commerce, in violation of 18 U.S.C. 2314. The indictment also sought criminal forfeiture of property traceable to or involved in the offenses. Pursuant to 21 U.S.C. 853(e)(1)(A), the district court granted the government's ex parte request for a pretrial restraining order barring petitioners from transferring or disposing of the relevant property. Petitioners moved to vacate the order, alleging that it prevented them from retaining counsel of their choice, and sought a pretrial hearing to challenge the restraint. The district court denied the motion without holding the hearing petitioners requested; on interlocutory appeal of that ruling, however, the court of appeals remanded the case for further consideration of whether a hearing was warranted. Pet. App. 48-93. The district court then held a hearing, at which petitioners challenged only the grand jury's determination that there was probable cause to believe they had committed the charged criminal offenses; they did not dispute the existence of probable cause to believe that the restrained assets were connected to the alleged criminal conduct. The district court held that only the latter question was properly at issue and denied petitioners' request to vacate the restraint. *Id.* at 43. The court of appeals affirmed. *Id.* at 1-37.

1. Forfeitures "are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct." *United States* v. *Ursery*, 518 U.S. 267, 284 (1996). Criminal forfeiture, however, is not a separate crime, or an element of another crime; instead, it is simply "an aspect of punishment imposed following conviction of a substantive criminal offense." *Libretti* v. *United States*, 516

U.S. 29, 39 (1996); see also, *e.g.*, *United States* v. *$8,850*, 461 U.S. 555, 567 (1983) (stating that a "criminal proceeding * * * may often include forfeiture as part of the sentence").

Various procedures regulating criminal forfeiture are set forth in 21 U.S.C. 853, which was enacted in 1984. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976. That provision requires "forfeit[ure] to the United States" of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of" certain offenses. 21 U.S.C. 853(a)(1). It also provides a means by which the government can obtain an order before trial "preserv[ing] the availability of property" that may be subject to forfeiture, so that it is not dissipated before a conviction. 21 U.S.C. 853(e)(1).

The statute specifies different procedures depending on whether the government seeks such an order before or after the filing of an indictment. Before the filing of an indictment, the court may enter a restraining order only temporarily and only if it determines, after an "opportunity for a hearing," that "there is a substantial probability that the United States will prevail on the issue of forfeiture"; that "failure to enter the order will result in the property being destroyed, removed * * *, or otherwise made unavailable for forfeiture"; and that "the need to preserve the availability of the property * * * outweighs the hardship on any party against whom the order is to be entered." 21 U.S.C. 853(e)(1)(B); see also 21 U.S.C. 853(e)(3) ("The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence."). Once an indictment has been filed, however, the court

"may enter a restraining order" or take other appropriate action ex parte so long as the indictment charges an offense for which criminal forfeiture may be imposed and "alleg[es] that the property * * * would, in the event of conviction, be subject to forfeiture." 21 U.S.C. 853(e)(1)(A); see Fed. R. Crim. P. 32.2.

Although the statute does not specify any hearing with respect to an order entered after the filing of an indictment, Congress contemplated that a post-restraint hearing with a limited scope might be appropriate in that context. The relevant Senate Report states that a court has the "authority to hold a hearing subsequent to the initial entry of the order," at which time the court can "modify the order or vacate an order that was clearly improper (*e.g.*, where information presented at the hearing shows that the property restrained was not among the property named in the indictment)." S. Rep. No. 225, 98th Cong., 1st Sess. 203 (1983) (Senate Report). But it also states that "at such a hearing the court is not to entertain challenges to the validity of the indictment" or otherwise "look behind" it; rather, "[f]or the purposes of issuing a restraining order, the probable cause established in the indictment * * * is to be determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based." *Id.* at 202-203.

2. In January 2005, petitioner Kerri Kaley, then a sales representative with Ethicon Endo-Surgery (a subsidiary of Johnson & Johnson), learned that she and her husband, petitioner Brian Kaley, were targets of a federal grand jury investigation in the Southern District of Florida. Pet. App. 3. The grand jury was investigating a scheme to steal prescription medical devices and re-sell them for profit. See *ibid.*

Each of the petitioners retained an attorney. Pet. App. 3. The two attorneys explained that they would charge a total of approximately $500,000 to litigate the case all the way through a trial. See *ibid.* To raise the necessary funds, petitioners applied for and obtained a home equity line of credit of $500,000 on their residence, the proceeds of which they used to purchase a certificate of deposit. See *ibid.* They later added some additional funds to the certificate. See 07-cr-80021 Docket entry No. 17, at 7 (S.D. Fla.).

3. On February 6, 2007, the grand jury indicted petitioners and co-defendant Jennifer Gruenstrass. Pet. App. 3-4. The indictment charged all three defendants with conspiracy to transport prescription medical devices in interstate commerce while knowing them to have been stolen, in violation of 18 U.S.C. 371 (Count 1); transportation of stolen devices in interst· te commerce, in violation of 18 U.S.C. 2314 (Counts 2-6); and obstruction of justice, in violation of 18 U.S.C. 1512(b)(3) (Count 7). Pet. App. 3. The indictment also included a criminal forfeiture allegation notifying petitioners of the government's intent, in the event of a conviction, to seek forfeiture of "all property, real and personal, constituting proceeds obtained from the aforestated offense(s) and all property traceable to such property," including the certificate of deposit. Docket entry No. 44, at 10 para. 2; see Pet. App. 3-4; see also Fed. R. Crim. P. 32.2(a) (providing that "[a] court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment * * * contains notice to the defendant that the government will seek the forfeiture of property as part of any sentence," and stating that "[t]he notice should not be designated as a count of the indictment"

and "need not identify the property subject to forfeiture").[1]

On April 10, 2007, the grand jury returned a superseding indictment that added an eighth count against petitioners and Gruenstrass: conspiracy to launder the proceeds of the Section 2314 offenses, in violation of 18 U.S.C. 1956(h). The superseding indictment alleged that the certificate of deposit and petitioners' residence were "involved in" the commission of the Section 1956(h) offense and were therefore subject to forfeiture. Pet. App. 4-5, 52; Docket entry No. 44, at 11.[2]

4. Upon "the filing of [the] indictment," 21 U.S.C. 853(e)(1)(A), the United States moved ex parte to restrain petitioners from transferring or otherwise disposing of the certificate of deposit and other property traceable to the alleged offenses. Pet. App. 4. On Feb-

---

[1] The forfeiture count in the indictment references 28 U.S.C. 2461(c) and 18 U.S.C. 981(a)(1)(C). Section 2461(c) provides that the government may pursue forfeiture in a criminal case whenever existing law authorizes civil forfeiture in connection with a criminal offense. See 28 U.S.C. 2461(c) (stating that the "procedures" in 21 U.S.C. 853 "apply to all stages of a criminal forfeiture proceeding"). Section 981(a)(1)(C) authorizes civil forfeiture of "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to * * * any offense constituting 'specified unlawful activity' (as defined in [18 U.S.C. 1956(c)(7)]." 18 U.S.C. 981(a)(1)(C). Section 1956(c)(7) defines "specified unlawful activity" to include, among other things, "any act or activity constituting an offense listed in [18 U.S.C. 1961(1)]," which, in turn, lists "interstate transportation of stolen property" in violation of 18 U.S.C. 2314. See 18 U.S.C. 1956(c)(7), 1961(1); Pet. App. 50-51 & nn.3-4.

[2] Pursuant to 18 U.S.C. 982(a)(1), property "involved in" an offense "in violation of" Section 1956 is subject to criminal forfeiture, as is "any property traceable to such property." 18 U.S.C. 982(a)(1); see 28 U.S.C. 2461(c).

ruary 8, 2007, the district court entered the requested order. Pet. App. 106; Docket entry No. 6.

In March and April 2007, petitioners filed various requests to vacate the order, arguing that without the restrained assets they would not be able to "retain counsel of choice." Docket entry No. 17, at 8; see Docket entry No. 53, at 6; Pet. App. 51-52. Meanwhile, at the request of a magistrate judge, the government filed under seal the declaration of a special agent "in support of [the] probable cause determination as to [the] restraint of the principal residence and the certificate of deposit." Docket entry No. 79.

On May 1, 2007, the magistrate judge rejected petitioners' arguments and entered an amended order restraining petitioners from transferring or disposing of the certificate of deposit or their principal residence. Docket entry No. 81, at 1-2; Pet. App. 5. The judge concluded that "[p]robable cause to * * * restrain defendants' principal residence and certificate of deposit exists," Docket entry No. 80; see Pet. App. 5, and that petitioners were not entitled to a hearing to challenge "the validity of the indictment itself," *id.* at 108-109.

Petitioners sought review of the magistrate judge's action. The district court "released" $63,007.65 of the amount in the certificate of deposit "from the protective order," but otherwise affirmed the magistrate judge's ruling. Pet. App. 104. The court agreed that "the United States has demonstrated probable cause to believe that [petitioners'] residence was 'involved in' the money laundering offense charged in the superseding indictment" and that the bulk of "the funds used to obtain the certificate of deposit are 'traceable to' the residence." *Id.* at 95-96. Applying *United States* v. *Bissell*, 866 F.2d 1343 (11th Cir.), cert. denied, 493 U.S. 876 (1989), the

court also concluded that petitioners did not have a due process right to an evidentiary hearing to "challenge the underlying merits of the indictment" before trial. Pet. App. 97 (citing *Bissell*, 866 F.2d at 1349 (citing *United States* v. *$8,850*, 461 U.S. 555 (1983), and *Barker* v. *Wingo*, 407 U.S. 514 (1972)).

5. On interlocutory appeal, the court of appeals reversed and remanded for further consideration of whether a pretrial evidentiary hearing was warranted. Pet. App. 56-72. The Eleventh Circuit agreed that *Bissell* provided the proper framework for the analysis, but held that an evidentiary hearing could address the "propriety" of the restraint even though it could not address petitioners' "guilt or innocence." *Id.* at 68. The court of appeals instructed the district court to "engage in a more searching exposition and calculus" of the possible prejudice that petitioners would suffer if they were unable to "retain * * * counsel of choice" (or "any private counsel" at all) and to determine if a hearing was warranted. *Id.* at 69-71.[3]

6. On remand, the district court concluded that petitioners were "entitled to an evidentiary hearing." Pet. App. 45. The court stated that the restraint "at issue, if wrongful, will deprive [petitioners] of their ability to retain counsel of their choice, which will severely impair [their] ability to defend [themselves]." *Id.* at 46 (internal quotation marks omitted) (brackets in original).[4]

---

[3] Judge Tjoflat specially concurred; he would have applied the balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and remanded "with instructions to afford the Kaleys a pretrial hearing at which they could show that the Government did not have probable cause to restrain[] their assets." Pet. App. 86, 92-93.

[4] Petitioners were represented at the time by the very counsel they wished to retain (as they had been from the beginning of the case,

The evidentiary hearing was held on July 29, 2010. See Pet. App. 39; Docket entry No. 233. Petitioners stated that they were "not contesting that the assets restrained were involved in and traceable to the conduct" alleged to constitute a crime. Docket entry No. 233, at 10. Rather, their only argument was that the government was not likely to succeed in establishing forfeitability because that conduct does not "constitute[] a crime." *Ibid.*; see *id.* at 11; Pet. App. 40. They supported that argument—which was based on the theory that petitioners were voluntarily supplied with prescription medical devices by hospitals and had no obligation to return those devices to Ethicon—by submitting transcripts from Gruenstrass's trial, which had resulted in an acquittal, as well as other documentary evidence. See Pet. App. 7, 22 n.6, 65.[5]

The district court declined to vacate the asset-restraint order. See Pet. App. 43. The court held that the only question properly before it was "whether the restrained assets are traceable to or involved in the alleged criminal conduct." *Id.* at 43 n.5. The court concluded that because petitioners had confined themselves to "challenging the validity of the indictment," they had not shown that continued restraint of their assets was improper. See *id.* at 42-43.

7. In a second interlocutory appeal, the court of appeals affirmed. Pet. App. 1-37. Explaining that the

---

and still are); those counsel had entered "temporary" appearances for purposes of litigating the asset-restraint issues. See, *e.g.*, Docket entry No. 233, at 3, 50 (noting "temporary" appearances and stating that counsel had not been paid as of 2010).

[5] The court denied petitioners' request for disclosure of grand jury transcripts and the sealed affidavit addressing probable cause. See Docket entry Nos. 197, 198, 219.

"only issue" before it was "the nature and scope" of the post-restraint, pretrial hearing, the court ruled that petitioners were not entitled "to challenge the factual foundation supporting the grand jury's probable cause determinations"—that is, "the very validity of the underlying indictment." *Id.* at 2, 9, 13; see *id.* at 15, 24 (stating that "a defendant who is entitled to a pretrial due process hearing with respect to restrained assets may challenge the nexus between those assets and the charged crime").

As an initial matter, the court of appeals concluded that 21 U.S.C. 853 did not require a hearing as a predicate to the continuation of a post-indictment restraining order. Pet. App. 15; see also *id.* at 10-11. Indeed, the court noted, allowing a defendant to challenge "the factual underpinnings of the underlying charges * * * would be at war with th[e] legislative history," which expressly stated that a court that decides to hold a hearing "is not to entertain challenges to the validity of the indictment." *Id.* at 16 (quoting Senate Report 203).

The court of appeals rejected the argument that due process nevertheless requires that, once a defendant is granted a hearing, he must be permitted to challenge the existence of probable cause. See Pet. App. 17; see *id.* at 23. The court highlighted a "long line of case authority" that bars a defendant from "challeng[ing] whether there is a sufficient evidentiary foundation to support the grand jury's probable cause determination." *Id.* at 21-22; see *id.* at 17-21 (citing, *inter alia*, *Costello* v. *United States*, 350 U.S. 359 (1956), and stating that "*Costello* and its progeny evince a powerful reluctance to allow pretrial challenges to the *evidentiary* support for an indictment"). And the court explained that petitioners sought to mount just such a "pretrial direct assault

on the indictment": they proposed to "lay[] out an elaborate theory that * * * the goods (the prescription medical devices) were not stolen in the first place," and to do so by "adduc[ing] additional evidence not presented to the grand jury." *Id.* at 22.

In the view of the court of appeals, such a challenge would have a number of damaging effects. First, it would "undermin[e] the grand jury system" and contravene the rule that a facially valid indictment "is enough to call for trial * * * on the merits." Pet. App. 23 (citation and internal quotation marks omitted). Second, it would "effectively require the district court to try the case twice," inserting a "mini-trial" between the grand jury's probable-cause determination and "the trial itself," even though the trial gives a defendant a full opportunity to address "the merits of the underlying charge." *Id.* at 25. Finally, requiring such a "mini-trial" would interfere with "the pretrial preservation of assets" that Congress sought to ensure, since it would force the government to a choice between "prematurely revealing its evidence" and forgoing a restraint that might be the only way to guard against dissipation of forfeitable property. *Id.* at 26, 28-29; see Senate Report 196 (discussing "potential for damaging premature disclosure of the government's case and trial strategy and for jeopardizing the safety of witnesses and victims * * * who would be required to testify"), quoted in Pet. App. 27.

The court of appeals counted several circuits that it believed agreed with its approach, but noted that others had reached a different conclusion. See Pet. App. 28-31 (citing cases). According to the court, "[t]he D.C. and Ninth Circuits, like the Second Circuit * * *, have held that the post-restraint hearing must address

whether there is probable cause to believe that the defendant is guilty of the crime that makes the assets forfeitable." *Id.* at 30-31 n.9 (citing *United States* v. *E-Gold, Ltd.*, 521 F.3d 411 (D.C. Cir. 2008); *United States* v. *Monsanto*, 924 F.2d 1186 (2d Cir.) (en banc), cert. denied, 502 U.S. 943 (1991); and *United States* v. *Roth*, 912 F.2d 1131 (9th Cir. 1990)).

Judge Edmondson concurred in the result. He explained that if he were writing on a blank slate, he would likely "reach a different result and write something largely in line with" the decisions of the Second and D.C. Circuits. Pet. App. 32, 34. Despite his "doubts," however, Judge Edmondson was not persuaded that the majority's conclusion was "definitely erroneous." Pet. App. 37.[6]

DISCUSSION

This case presents an issue that has divided the circuits: whether an indicted defendant whose assets have been restrained and who claims that those assets are necessary to pay for counsel of choice must, if granted a post-restraint, pretrial hearing, be permitted to challenge the existence of probable cause for the criminal charges supporting forfeiture. The court of appeals correctly held that no such requirement exists, and it properly limited the scope of the hearing to an assessment of the probable cause to believe that the restrained assets are sufficiently connected with the charged crimes to be potentially forfeitable. But because the issue of the scope of the hearing is one of importance to

---

[6] On September 20, 2012, on remand from the second appeal, the district court stayed the case pending this Court's disposition, while noting that "[t]his case was indicted over five and one-half years ago." Docket entry No. 259, at 1-2.

the administration of the criminal forfeiture provisions as to which the courts of appeals have reached conflicting conclusions, this Court's review is warranted.

1. The court of appeals correctly held that the scope of a pretrial hearing on restrained assets is limited to whether the assets have a sufficient connection to the charged offense to justify the restraint.

a. In *United States* v. *Monsanto*, 491 U.S. 600 (1989), this Court held that Section 853 "authorizes a district court to enter a pretrial order freezing assets in a defendant's possession, even where the defendant seeks to use those assets to pay an attorney," and that "such an order is permissible under the Constitution." *Id.* at 602. The defendant in *Monsanto* was subject to an ex parte restraining order entered under Section 853 and claimed that the order interfered with his ability to pay for counsel; the district court subsequently held a four-day hearing and concluded that the government "had 'overwhelmingly established a likelihood' that the property in question would be forfeited at the end of the trial." *Id.* at 604-605. The defendant proceeded to trial, where he was represented by a court-appointed attorney. See *id.* at 605.

This Court rejected a variety of statutory and constitutional challenges to the pretrial restraint. First, the Court concluded that Section 853 "is unambiguous in failing to exclude assets that could be used to pay an attorney from its definition of forfeitable property." *Monsanto*, 491 U.S. at 607; see *id.* at 612-613 (explaining that Section 853(e)(1)(A), which authorizes a post-indictment, pretrial restraint, "cannot sensibly be construed to give the district court discretion to permit the dissipation of the very property that § 853(a) requires be forfeited upon conviction").

Second, the Court relied on *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989), to reject the argument that the Fifth and Sixth Amendments "require[] Congress to permit a defendant to use assets" that are forfeitable under the statute "to pay that defendant's legal fees." *Monsanto*, 491 U.S. at 614. In *Caplin & Drysdale*, which was decided the same day as *Monsanto* and involved a defendant who sought to pay attorneys' fees out of assets forfeited after a guilty plea, the Court concluded both that Section 853 is not "invalid under the Due Process Clause of the Fifth Amendment" and that "there is a strong governmental interest in obtaining full recovery of all forfeitable assets * * * that overrides any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense." *Id.* at 619, 625-626, 631-634; see *id.* at 631 (explaining that were the rule otherwise "there would be an interference with a defendant's Sixth Amendment rights whenever the Government freezes or takes some property in a defendant's possession before, during, or after a criminal trial").

Finally, *Monsanto* considered a constitutional issue that was not directly presented in *Caplin & Drysdale* because of the procedural posture of that case: whether the government may "freez[e] the assets in question before [the defendant] is convicted * * * and before they are finally adjudged to be forfeitable." *Monsanto*, 491 U.S. at 615. The Court concluded that "assets in a defendant's possession may be restrained in the way they were here based on a finding of probable cause to believe that the assets are forfeitable." *Ibid.* Noting that the defendant "was not ousted from his property, but merely restrained from disposing of it," the Court explained that "it would be odd to conclude that the

Government may not restrain property * * * based on a finding of probable cause" when it may "restrain *persons*" based on that same finding. *Ibid.*

The *Monsanto* Court did not consider, however, "whether a hearing was required by the Due Process Clause" or whether the hearing that was held "was an adequate one." 491 U.S. at 615 n.10. The Court explained that such consideration was not called for because the government had "prevailed in the District Court notwithstanding the hearing" and the court of appeals had not addressed procedural due process. *Ibid.*

b. This case presents an issue about the scope of a post-restraint, pretrial hearing that *Monsanto* did not resolve: whether a defendant at such a hearing must be permitted to challenge the grand jury's finding of probable cause to believe that he committed the charged crimes. Nothing in Section 853 permits a defendant to raise such a challenge, and the legislative history unequivocally states that any hearing should not "look behind" the indictment in that fashion. Senate Report 202. The only remaining question is whether the Constitution imposes such a requirement. The court of appeals correctly ruled that it does not.

First, as the Eleventh Circuit explained, allowing a defendant to contest probable cause before trial would impermissibly attack the grand jury's probable cause determination. This Court's decisions exhibit "profound reluctance" to "allow pretrial challenges to a grand jury's probable cause determination" on the elements of an offense. Pet. App. 17. See *Costello* v. *United States*, 350 U.S. 359, 363 (1956) ("An indictment returned by a legally constituted and unbiased grand jury, * * * if valid on its face, is enough to call for trial of the charge

on the merits. The Fifth Amendment requires nothing more."); see also *United States* v. *Williams*, 504 U.S. 36, 54-55 (1992) ("Our words in *Costello* bear repeating: Review of facially valid indictments on [the] grounds [of inadequate evidence] 'would run counter to the whole history of the grand jury institution, and neither justice nor the concept of a fair trial requires it.'") (quoting *Costello*, 350 U.S. at 364)); *Bank of N.S.* v. *United States*, 487 U.S. 250, 261 (1988) (explaining that a facially valid indictment is not subject to "a challenge to the reliability or competence of the evidence presented to the grand jury," because "a court may not look behind the indictment to determine if the evidence upon which it was based is sufficient"); *United States* v. *Calandra*, 414 U.S. 338, 344-345 (1974) ("[T]he validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence."); *Lawn* v. *United States*, 355 U.S. 339, 349 (1958) ("[A]n indictment returned by a legally constituted nonbiased grand jury, * * * if valid on its face, is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment.").

Indeed, as *Monsanto* points out, an indictment that is fair on its face and returned by a properly constituted grand jury is a sufficient predicate for subjecting the defendant to restraints on his liberty pending trial. See *Monsanto*, 491 U.S. at 615-616; see also, *e.g.*, *Gerstein* v. *Pugh*, 420 U.S. 103, 117 n.19 (1975) (stating that the grand jury "conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry"). An analogous probable cause determination therefore must amount to a consti-

tutionally adequate basis for the much less intrusive step of imposing restraints on the alienation of certain property pending trial. See *Monsanto*, 491 U.S. at 615-616.

Second, mandating a pretrial hearing at which the defendant may address guilt or innocence, rather than simply traceability, would unduly burden the government's interest in the relevant property. As the court of appeals observed, a rule allowing petitioners to challenge the existence of probable cause to believe they committed the charged offenses would risk the premature disclosure of the government's case and trial strategy and could even jeopardize the safety of testifying witnesses, including victims and cooperators. Pet. App. 27; see also, *e.g.*, *United States* v. *Monsanto*, 924 F.2d 1186, 1206 (2d Cir.) (en banc) (Cardamone, J., dissenting) ("The prosecution's ability to prepare its case without being forced to 'tip its hand' prematurely was of paramount importance to the drafters and provides a persuasive reason for delaying a full adversarial hearing on the merits of the government's case during the post-restraint, pretrial period."), cert. denied, 502 U.S. 943 (1991).[7] If the government were to forgo a pretrial re-

---

[7] Petitioners suggest (*e.g.*, Pet. 29 n.6) that those concerns are not salient in this case because Gruenstrass's trial has already taken place. But the government's case against petitioners is not identical to the case against Gruenstrass and, as a general matter, significant risks are posed by prematurely requiring disclosure of the government's witnesses and evidence. See, *e.g.*, *United States* v. *Ruiz*, 536 U.S. 622, 631-633 (2002) (discussing the importance of avoiding "premature disclosure of Government witness information"); *United States* v. *Celis*, 608 F.3d 818, 828-837 (D.C. Cir.) (rejecting due process challenge to limits on "[d]isclosure of government witness lists and of exculpatory or impeachment information and evidence" in drug trafficking case in light of "concern about witness security"),

straint on the property in order to avoid those adverse effects, then the property could well be dissipated before the end of the trial, and a convicted defendant would escape an important part of the penalty for the crime. See *Monsanto*, 491 U.S. at 616 (discussing importance of "protect[ing] the community's interest in full recovery of any ill-gotten gains").

Accordingly, the court of appeals correctly concluded that the additional process that petitioners seek is unwarranted. *Monsanto* established that "probable cause to believe that the assets are forfeitable" is sufficient to justify a pretrial restraint. 491 U.S. at 615. That is exactly the determination that the grand jury has already made (and, in this case, that the district court has also made independently based on an ex parte submission by the government, see Pet. App. 95-96; Docket entry No. 80). No reason exists to think that an extra layer of procedure on that score—one that could be undertaken only at significant cost—would be beneficial, much less that it is constitutionally mandated.

2. Petitioners appear to suggest that this Court should resolve what they describe as a disagreement among the circuits over the proper standard for determining whether a post-restraint, pretrial hearing is required at all. See Pet. 28-37, 39; NACDL Amicus Br. 3. But this case does not implicate any such disagreement. The district court concluded that petitioners were entitled to a post-restraint evidentiary hearing because the restraint impinged on their ability to retain counsel of their choice, and it held such a hearing at which petitioners submitted evidence. See Pet. App. 7, 22 n.6; Docket entry No. 233. The court of appeals did not

---

cert. denied, 131 S. Ct. 620 (2010); see also Pet. App. 3 (noting that petitioners were charged with obstruction of justice).

dispute that an evidentiary hearing was warranted here. Accordingly, any inquiry in this case into the correct framework for determining entitlement to a hearing in the first instance would be entirely advisory. Cf. *Monsanto*, 491 U.S. at 615 n.10 ("[G]iven that the Government prevailed in the District Court notwithstanding the hearing, it would be pointless for us now to consider whether a hearing was required by the Due Process Clause.").[8]

This case does, however, implicate a conflict among the circuits over the scope of such a hearing—an issue that almost all circuits have now addressed. See Pet. App. 28-31. Several courts of appeals have agreed with the Eleventh Circuit's conclusion that "[d]ue process does not require that a defendant be allowed to challenge * * * whether there is probable cause to believe that he committed the underlying offenses" and that the hearing should be restricted to examining whether the

---

[8] The courts below premised the decision that petitioners were entitled to a hearing on the conclusion that, because of petitioners' financial situation, the restraint "at issue, if wrongful, will deprive [petitioners] of their ability to retain counsel of their choice, which will severely impair [their] ability to defend [themselves]." Pet. App. 46; see also *id.* at 13. Given the passage of time, however, it is not clear whether that premise remains true; petitioners' financial situation may have improved since their assets were last scrutinized several years ago. See Docket entry No. 252, at 6 n.10 ("The United States recognizes that in the intervening 3+ years, some alteration of the economic circumstances of the defendants may have occurred. In fact, the government is aware that the lead defendant [Kerri Kaley] is actively employed in the healthcare industry, owns her own boutique and has been profiled regarding the financial success of that company in the media."). Whatever this Court's disposition, the issue of whether the restraint in this case continues to impair petitioners' ability to pay for counsel of their choice should be left open for further proceedings in the district court.

restrained assets have a sufficient connection to the charged crimes. *Id.* at 23. For instance, in *United States* v. *Jones*, 160 F.3d 641 (10th Cir. 1998), the Tenth Circuit ruled that where a defendant is entitled to a post-restraint, pretrial hearing on restraint of potentially forfeitable assets, the government need not "reestablish probable cause to believe that defendants are guilty of the underlying * * * offense." *Id.* at 648. Such a requirement, the court said, "would add nothing to protect defendants' interests and does more damage than necessary to section 853(e)(1)(A) and the role of the grand jury." *Ibid.* Accordingly, in the Tenth Circuit "[t]he district court must take th[e] allegations of the indictment as true and assume at the hearing that the underlying offense has been committed," and the hearing is restricted to the question of whether "the assets are traceable to the underlying offense." *Id.* at 648-649.

Several circuits have indicated approval of the Tenth Circuit's approach. See *United States* v. *Jamieson*, 427 F.3d 394, 406-407 (6th Cir. 2005) (stating that the court had "no quarrel with the district court's decision to apply *Jones*"), cert. denied, 547 U.S. 1218 (2006); see also *United States* v. *Farmer*, 274 F.3d 800, 803-806 (4th Cir. 2001) (citing *Jones* with approval in case in which defendant's "assets were seized pursuant to civil forfeiture, based on the same allegedly illegal activities underlying his current criminal indictment," which "placed [him] in the same position as a criminal defendant whose assets are seized pursuant to criminal forfeiture," and concluding that the hearing was "for limited purposes" and should cover whether "the government seized untainted assets without probable cause").[9]

---

[9] In *United States* v. *Yusuf*, 199 Fed. Appx. 127 (3d Cir. 2006), cert. denied, 129 S. Ct. 2764 (2009), a nonprecedential decision, the Third

Other courts of appeals have reached the opposite conclusion, however. For instance, in *United States* v. *Monsanto*, 924 F.2d 1186 (2d Cir.) (en banc), cert. denied, 502 U.S. 943 (1991), the Second Circuit held that at a post-restraint, pretrial hearing a defendant who needs the restrained assets to retain counsel of choice must be permitted, as a matter of due process, to challenge a grand jury's probable cause determination that "the defendant committed crimes that provide a basis for forfeiture." *Id.* at 1203. The en banc court therefore interpreted "section 853(e)(1)(A) to allow consideration of [such] probable cause issues in post-indictment hearings, in order to avoid potential constitutional infirmity of that statutory provision under the fifth and/or sixth amendments." *Id.* at 1200; see *id.* at 1197 (stating that "a pretrial adversary hearing addressing the existence of probable cause as to both the commission of a narcotics offense and the forfeitability of the specified property affords a procedural safeguard of substantial value"); *id.* at 1203-1204 (Oakes, J., concurring).

The D.C. Circuit adopted that reasoning in *United States* v. *E-Gold, Ltd.*, 521 F.3d 411 (2008). The court

---

Circuit adopted "the framework outlined in *Jones*" and stated that "[t]he post-restraint inquiry at the adversarial hearing is limited to the traceability of the restrained assets, and, thus, the government need not reestablish probable cause to believe that defendants are guilty of the underlying offense." *Id.* at 132-133. As the court below pointed out, the Third Circuit previously held in *United States* v. *Long*, 654 F.2d 911 (1981), that "the government must demonstrate that it is likely to convince a jury * * * that the defendant is guilty of" the underlying offense in order to obtain a restraint on assets. *Id.* at 915; see Pet. App. 30 n.9. But *Long*, which *Yusuf* did not cite, did not involve Section 853 and was decided before this Court's ruling in *Monsanto*; its continuing relevance is therefore questionable. See *ibid.*

"join[ed] the Second Circuit" in holding that defendants who "are not financially capable of retaining counsel of choice without the seized property" are constitutionally entitled to challenge at a hearing probable cause as to both the question of "guilt" and the question of the "forfeitability of the specified assets." *Id.* at 419 (citation and internal quotation marks omitted); see *id.* at 416 ("The Second Circuit * * * determined the question before us in the present case, and we find its reasoning most instructive.").[10]

Those decisions cannot be reconciled with the decision below (or the decisions of the other courts of appeals that have staked out a position similar to that of

---

[10] The law in the Seventh and Ninth Circuits is murkier, but they appear to follow the same approach. See, *e.g.*, *United States* v. *Roth*, 912 F.2d 1131, 1133-1134 (9th Cir. 1990) (holding that probable cause was established at a post-restraint, pretrial hearing by evidence that apparently addressed the defendant's guilt as well as the traceability of the assets); *United States* v. *Dejanu*, 37 Fed. Appx. 870, 873 (9th Cir. 2002) (holding that district court had erred in stating that it did not need to address "probable cause to believe Dejanu had committed the crimes with which he was charged" at a hearing on the restraint of defendant's assets); *United States* v. *Moya-Gomez*, 860 F.2d 706, 725-731 (7th Cir. 1988) (requiring hearing that addresses "the sufficiency of the factual basis for [the government's] assertion that the funds subject to the restraining order eventually would be forfeited to the United States"), cert. denied, 492 U.S. 908 (1989); *United States* v. *Michelle's Lounge*, 39 F.3d 684, 700 (7th Cir. 1994) (relying on *Moya-Gomez* and stating that when "the government has seized through civil forfeiture all of the assets a criminal defendant needs to obtain counsel" an adversary hearing must be held in the civil case at which "the defendant could rebut the government's showing of probable cause" by proving "innocent ownership, or that a government informant is unreliable, or that the property had no connection to drugs").

the Eleventh Circuit). This Court's intervention is necessary to resolve the conflict.

3. This case is a suitable vehicle for the Court to rule on the scope of a post-indictment, pretrial hearing challenging the restraint of potentially forfeitable assets. Petitioners adequately preserved their claim that they were entitled to attack the grand jury's probable cause finding on the underlying crimes, and that was their only challenge. See Pet. App. 42 (stating that the "basic thrust" of petitioners' challenge "is that the government's case has no merit" and petitioners "have not attempted to challenge" the traceability question); *id.* at 8 (stating that petitioners "did not attempt to challenge traceability in any way" but instead "argu[ed] only that the government's underlying case had no merit"). The lower courts held that no such opportunity was constitutionally required. And while petitioners' challenge may well have failed on the merits, their motion to lift the restraint on their assets was denied on the ground that the challenge was not properly within the scope of the district court's task.

Normally, the fact that a case is in an interlocutory posture would weigh against this Court's review. Here, petitioners have not even been arraigned yet, even though more than five years have elapsed since they were indicted. See Docket entry No. 252, at 1-2, 8. This Court "generally await[s] final judgment in the lower courts before exercising * * * certiorari jurisdiction." *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari); see *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Cases presenting the question at issue here, however, typically arise in an interlocutory posture, since orders

relating to the restraint of assets are treated as orders "granting, continuing, modifying, refusing, or dissolving injunctions" for purposes of 28 U.S.C. 1292(a)(1). See, *e.g.*, *E-Gold*, 521 F.3d at 414 (collecting cases). And, while deprivation of counsel of choice at trial is structural error, entitling a defendant to reversal of a conviction without regard to a harmless-error analysis, see *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 147-152 (2006), it is not at all clear that petitioners' due process claim would survive conviction. The jury's finding of guilt beyond a reasonable doubt, rendered in a proceeding in which the defendants enjoyed the effective assistance of counsel, may be both fair and reliable. See *id.* at 145 (stating that deprivation of counsel of choice can occur even when "the trial is, on the whole, fair"). And such a verdict may well render harmless any failure to accord a hearing before trial to determine whether probable cause exists to believe the defendants are guilty. Cf. *United States* v. *Mechanik*, 475 U.S. 66, 67 (1986) ("[T]he petit jury's verdict of guilty beyond a reasonable doubt demonstrates *a fortiori* that there was probable cause to charge the defendants with the offenses for which they were convicted."). In this particular context, then, in which resolution of the question presented could significantly affect the way that the remainder of the proceedings below are conducted and review at a later time may not be possible, the recurring issue presented in this case may appropriately be resolved on interlocutory review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL A. ROTKER
Attorney

FEBRUARY 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
NOV 14 2012
OFFICE OF THE CLERK

No. 12-464

In the
Supreme Court of the United States of America

KERRI L. KALEY and BRIAN P. KALEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On a Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Prof. Ricardo J. Bascuas
Counsel of Record
UNIV. OF MIAMI SCHOOL OF LAW
1311 Miller Drive
Coral Gables, Florida 33146
305-284-2672
rbascuas@law.miami.edu
Counsel for NACDL

Library of Congress
Law Library

INTEREST OF THE AMICUS CURIAE*

The National Association of Criminal Defense Lawyers is a nonprofit professional bar association that works on behalf of criminal-defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of 11,000 and an affiliate membership of almost 40,000. Its members include private criminal-defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only national professional bar association for public defenders and private criminal-defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization with full representation in its House of Delegates. This case implicates NACDL's mission because it concerns the structural Sixth Amendment right to counsel of choice.

SUMMARY OF THE ARGUMENT

The circuit courts of appeals are divided over the process due defendants whose assets are restrained while the government prosecutes them. The courts disagree over whether a pre-trial adversarial hearing is always required, whether defendants can challenge the probable cause finding underlying the charges, and whether defendants bear the burden of proof. In this case, the Petitioners retained counsel when they came under investigation. Two years later, after indictment, the government obtained an *ex parte* order calculated

---

*Counsel for the parties was timely notified of NACDL's intent to file this brief and agreed to its filing. No party or counsel for a party authored any part of it or contributed money intended to fund its preparation or submission. NACDL paid all costs associated with preparing and submitting it.

to impoverish the Petitioners and deprive them of any further assistance of their counsel. The Eleventh Circuit afforded the Petitioners a hearing only as to whether the restrained assets were traceable to the charges, not as to whether the government was likely to prove the charges. Other circuits allow challenges to the probable cause finding embodied in a grand jury's indictment because, even if a case ends in acquittal, there is no way to know whether an erroneous asset seizure prolonged the prosecution or inflicted other injury. Because this issue implicates a structural right critical to the Nation's adversarial system of criminal justice, this Court should clarify that a grand jury's probable cause determination does not relieve the government of any of its usual burden, when it seeks to restrain or seize property, of showing at a prompt, adversarial hearing that it has good cause to do so.

ARGUMENT

Whether effected via criminal-forfeiture provisions, *see* 18 U.S.C. § 1963(d), 21 U.S.C. § 853(e), or through parallel civil-forfeiture proceedings, *see United States v. Michelle's Lounge*, 39 F.3d 684, 696 (C.A.7 1994), restraining defendants' assets during a prosecution implicates a structural right and risks inflicting unknowable injustices. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). Our faith that confrontation between the government and the accused reliably uncovers truth and separates the guilty from the not-guilty depends on the endurance of "a healthy, independent defense bar" to ensure "a truly equal and adversarial presentation of the case." *Caplin & Drysale, CA v. United States*, 491 U.S. 617, 647–48

(1989) (Blackmun, J., dissenting). Pre-trial restraints of assets corrode this pillar of our system by threatening "to decimate the criminal defense bar" and bring about the "'virtual socialization of criminal defense work in this country.'" *Id.* at 651, 647.

The circuit courts of appeals are splintered over the process due defendants deprived of the use of assets for their defense. *See* Petition at 23–29. The decision below comprehends three erroneous holdings that conflict with those of other circuits: **(1)** Due process does not always require a pre-trial hearing on the legality of restraining assets needed to hire counsel. *United States v. Kaley*, 677 F.3d 1316, 1322 (C.A.11 2012). *Compare United States v. E-Gold, Ltd.*, 521 F.3d 411, 419 (C.A.D.C. 2008); *United States v. Melrose East Subdivision*, 357 F.3d 493, 499 (C.A.5 2004); *United States v. Farmer*, 274 F.3d 800, 805 (C.A.4 2001); *United States v. Jones*, 160 F.3d 641, 647 (C.A.10 1998); *United States v. Roth*, 912 F.2d 1131, 1134 (C.A.9 1990). **(2)** Defendants can challenge only whether the assets flowed from or facilitated the crimes alleged. *Kaley*, 677 F.3d at 1323. *Compare E-Gold*, 521 F.3d at 419; *Michelle's Lounge*, 39 F.3d at 700–01; *United States v. Monsanto*, 924 F.2d 1186, 1203 (C.A.2 1991); *Roth*, 912 F.2d at 1134; *United States v. Lewis*, 759 F.2d 1316, 1324 (C.A.8 1985); *United States v. Long*, 654 F.2d 911, 915 (C.A.3 1981). **(3)** Defendants have the burden of proof. *Kaley*, 677 F.3d at 1322. *Compare Jones*, 160 F.3d at 647; *Monsanto*, 924 F.2d at 1203; *Roth*, 912 F.2d at 1134.

This Court has not had occasion to reach this issue because rarely will a case travel to this Court burdened by the millstone of a pre-trial restraint on assets.

Petitioners retained counsel in 2005 when they came under investigation. 677 F.3d at 1318. Two years later, after indictment, the government obtained an *ex parte* order aimed at terminating their counsels' involvement and relegating the defense to appointed counsel having no familiarity with the case. *Id.* Petitioners' original counsel have since then championed their clients' structural right to choose their own counsel through two interlocutory appeals. *Id.* It is this increasingly uncommon level of advocacy that *ex parte* restraints have imperiled and that this Court should safeguard.

The last cases raising issues of restraints on assets needed for attorney's fees reached this Court only after conviction. The defendant in *United States v. Monsanto* was tried with appointed counsel representing him, 491 U.S. 600, 605 n.5 (1989), and the defendant in *Caplin & Drysdale* pled guilty, 491 U.S. at 621. Neither case required this Court to decide "whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed," *Monsanto*, 491 U.S. at 615 n.10, and the issue remains open and pressing.

Another asset seizure case decided in the 1988 term indicates that the Eleventh Circuit's decision gives the government an unconstitutional advantage in criminal prosecutions. *Fort Wayne Books v. Indiana* held that a racketeering defendant whose assets were seized was entitled to a pre-trial hearing not only as to whether the assets were traceable to the charges but also as to whether the crimes occurred. 489 U.S. 46, 67 (1989). Alleging the sale of obscenity, Indiana seized three bookstores and their contents. *Id.* at 52. This Court treated the inventory of books and films just as any other proceeds or instrumentalities of crime, "such as

a bank account or a yacht." *Id.* at 65. But, because the seizure might effect a prior restraint on speech, the state had to show a pattern of racketeering at a pre-trial, adversary hearing. *Id.* at 67.

As much as prior restraints on speech, restraints on the right to counsel of choice have unknowable and potentially grave consequences. *Gonzalez-Lopez*, 548 U.S. at 150. While the Court had no reason to decide whether the "extensive, 4-day hearing" afforded in *Monsanto* "was an adequate one," 491 U.S. at 615 n.10, the allusion to *United States v. Salerno*, 481 U.S. 739 (1987), *id.* at 616, indicates what due process requires. *Salerno* approved the pre-trial detention of an indicted person only after a hearing at which the weight of the government's evidence is considered. 481 U.S. at 750. The circuits holding that a grand jury's *ex parte* probable cause determination is unassailable have unduly compromised the structural right to counsel.

CONCLUSION

Foreclosing the choice of counsel limits defenses in the courtroom just as stopping the sale of books limits ideas in the marketplace. The writ should issue.

Respectfully submitted,

Prof. Ricardo J. Bascuas
UNIV. OF MIAMI SCHOOL OF LAW
1311 Miller Drive
Coral Gables, Florida 33146
305-284-2672
rbascuas@law.miami.edu
Counsel for NACDL

JOINT APPENDIX

No. 12-464

In The Supreme Court of the United States

KERRI L. KALEY and
BRIAN P. KALEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

HOWARD M. SREBNICK
Counsel of Record for Petitioners
BLACK, SREBNICK, KORNSPAN & STUMPF, P.A.
201 So. Biscayne Blvd., Suite 1300
Miami, FL 33131
(305) 371-6421
Hsrebnick@RoyBlack.com

G. RICHARD STRAFER
Co-Counsel for Petitioners
G. RICHARD STRAFER, P.A.
201 So. Biscayne Blvd., Suite 1380
Miami, FL 33131
(305) 374-9091
StraferPA@aol.com

DONALD B. VERRILLI, JR.
Counsel of Record for Respondent
SOLICITOR GENERAL OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
Room 5614
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
(202) 514-2217
SupremeCtBriefs@USDOJ.gov

Petition For Certiorari Filed October 11, 2012
Certiorari Granted March 18, 2013

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress
Law Library

JOINT APPENDIX TABLE OF CONTENTS

Page

Relevant Docket Entries, United States District Court, Southern District of Florida 1

Relevant Docket Entries, United States Court of Appeals for the Eleventh Circuit 28

Indictment, 2/6/2007 29

Protective Order, 2/8/2007 44

Superseding Indictment, 4/10/2007 48

Amended Protective Order, 5/2/2007 66

Government's Response to Motion to Continue, 7/13/2007 69

Government's Response to Magistrate's Order, 10/15/2007 74

Transcript, Status Conference, 5/12/2010 76

Declaration of Ethicon Endo-Surgery, Inc.'s Records Coordinator, 7/28/2010 94

Transcript, Evidentiary Hearing, 7/29/2010 99

The following opinions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Order of the United States District Court for the Southern District of Florida (5/2/2007) ..... Pet. App. 105

Opinion and Order of the United States District Court for the Southern District of Florida (6/25/2007) ..... Pet. App. 94

JOINT APPENDIX
TABLE OF CONTENTS – Continued

Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit (8/18/2009) ..... Pet. App. 48

Order of the United States District Court for the Southern District of Florida (3/29/2010) ..... Pet. App. 44

Order of the United States District Court for the Southern District of Florida (10/25/2010) ..... Pet. App. 38

Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit (4/26/2012) ..... Pet. App. 1

Order of the United States Court of Appeals for the Eleventh Circuit on Petition for Rehearing (7/17/2012) ..... Pet. App. 113

Order of the United States District Court for the Southern District of Florida (granting Motion to Stay pending Petition for writ of Certiorari) (9/20/2012) ..... Pet. App. 115

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA (WEST PALM BEACH) CASE #: 9:07-cr-80021-KAM

Case title: USA v. Kaley et al Date Filed: 02/06/2007

Date Filed	#	Docket Text
02/06/2007	1	INDICTMENT as to Kerri L. Kaley (1) count(s) 1, 2-6, 7, Brian P. Kaley (2) count(s) 1, 2-6, 7, Jennifer L. Gruenstrass (3) count(s) 1, 2-6, 7 and forfeiture. (cg1) (Entered: 02/06/2007)
02/07/2007	5	Ex Parte MOTION for Protective Order *as to property sought for forfeiture* by USA as to Kerri L. Kaley, Brian P. Kaley, Jennifer L. Gruenstrass. Responses due by 2/22/2007 (Attachments: # 1)(Lehr, Alison) (Entered: 02/07/2007)
02/08/2007	6	ORDER granting 5 Motion for Protective Order as to Kerri L. Kaley (1), Brian P. Kaley (2), Jennifer L. Gruenstrass (3). (See order for details.)Signed by Judge Kenneth A. Marra on 2/7/2007. (mt) (Entered: 02/08/2007)
02/28/2007	13	NOTICE OF TEMPORARY ATTORNEY APPEARANCE: Howard Milton Srebnick appearing for Kerri L. Kaley, Brian P. Kaley (ls) Modified on 3/1/2007 (ls). (Entered: 03/01/2007)

03/05/2007	17	Defendant's MOTION to Vacate, *In Whole or In Part, the Protective Order And For a Hearing Concerning the Scope and Legality of the Protective Order Under the Fifth and Sixth Amendments* by Kerri L. Kaley, Brian P. Kaley. (Attachments: # 1 # 2)(Srebnick, Howard) Modified on 3/6/2007 (hd). ERROR: missing attachment description (Entered: 03/05/2007)
03/05/2007	18	NOTICE OF TEMPORARY ATTORNEY APPEARANCE: Susan Wright Van Dusen appearing for Brian P. Kaley (Van Dusen, Susan) (Entered: 03/05/2007)
03/19/2007	27	RESPONSE in Opposition by USA as to Kerri L. Kaley, Brian P. Kaley re 17 Defendant's MOTION to Vacate, *In Whole or In Part, the Protective Order And For a Hearing Concerning the Scope and Legality of the Protective Order Under the Fifth and Sixth Amendments* (Lehr, Alison) (Entered: 03/19/2007)
03/20/2007	28	ORDER REFERRING MOTION to Magistrate Judge James M. Hopkins as to Kerri L. Kaley, Brian P. Kaley 17 Defendant's MOTION to Vacate, *In Whole or In Part, the Protective Order And For a Hearing Concerning the Scope and Legality of the Protective Order Under the Fifth and Sixth Amendments* filed

		by Brian P. Kaley, Signed by Judge Kenneth A. Marra on 3/19/2007. (mt) (Entered: 03/20/2007)
04/02/2007	38	NOTICE *of Filing Defendants Kerri and Brian Kaley's Reply In Support of Their Motion To Vacate Protective Order* by Kerri L. Kaley, Brian P. Kaley re 6 Order on Motion for Protective Order (Attachments: # 1)(Srebnick, Howard) (Entered: 04/02/2007)
04/06/2007	42	Minute Entry for proceedings held before Judge James M. Hopkins :Telephone Conference as to Kerri L. Kaley held on 4/6/2007 (Tape #JMH-07-23-1.) (ck) (Entered: 04/06/2007)
04/06/2007	43	Minute Entry for proceedings held before Judge James M. Hopkins :Telephone Conference as to Brian P. Kaley held on 4/6/2007 (Tape #JMH-07-23-1.) (ck) (Entered: 04/06/2007)
04/10/2007	44	INDICTMENT as to Kerri L. Kaley (1) count(s) 1s, 2s-6s, 7s, 8s, Brian P. Kaley (2) count(s) 1s, 2s-6s, 7s, 8s, Jennifer L. Gruenstrass (3) count(s) 1s, 2s-6s, 7s, 8s. (ck) (Entered: 04/11/2007)
04/17/2007	52	Defendant's MOTION To Bar Pretrial Restraints Based On A "Facilitation" Theory and Incorporated Memorandul [sic] of

		Law by Kerri L. Kaley, Brian P. Kaley. Responses due by 5/1/2007 (Srebnick, Howard) (Entered: 04/17/2007)
04/17/2007	53	MOTION Defendant's Kerri and Brian Kaley's Outline of the Remaining Issues Concerning The Scope and Legality of the Protective Order by Kerri L. Kaley, Brian P. Kaley. Responses due by 5/1/2007 (Srebnick, Howard) (Entered: 04/17/2007)
04/19/2007	57	RESPONSE by USA as to Kerri L. Kaley, Brian P. Kaley *Outstanding Issues* (Lehr, Alison) (Entered: 04/19/2007)
04/23/2007	65	Application for Writ of Habeas Corpus ad Testificandum *As To Alan T. Schmidt* by Kerri L. Kaley, Brian P. Kaley (Srebnick, Howard) (Entered: 04/23/2007)
04/24/2007	66	Writ of Habeas Corpus ad Testificandum DENIED as to Alan Schmidt for 4/27/07 in case as to Kerri L. Kaley, Brian P. Kaley Signed by Magistrate Judge James M. Hopkins on 4/24/07. (JMH) (Entered: 04/24/2007)
04/24/2007	68	RESPONSE in Opposition by USA as to Kerri L. Kaley, Brian P. Kaley re 52 Defendant's MOTION To Bar Pretrial Restraints Based On A "Facilitation" Theory and

		Incorporated Memorandul [sic] of Law (Lehr, Alison) (Entered: 04/24/2007)
04/26/2007	69	REPLY TO RESPONSE to Motion by Kerri L. Kaley, Brian P. Kaley re 17 Defendant's MOTION to Vacate, *In Whole or In Part, the Protective Order And For a Hearing Concerning the Scope and Legality of the Protective Order Under the Fifth and Sixth Amendments* (Srebnick, Howard) (Entered: 04/26/2007)
04/27/2007	70	NOTICE *Of Filing the Sentencing Transcript of Alan T. Schmidt Case No. 06-Cr-60172\Zloch* by Kerri L. Kaley, Brian P. Kaley re 17 Defendant's MOTION to Vacate, *In Whole or In Part, the Protective Order And For a Hearing Concerning the Scope and Legality of the Protective Order Under the Fifth and Sixth Amendments* (Attachments: # 1)(Srebnick, Howard) (Entered: 04/27/2007)
04/27/2007	71	ORDER REFERRING CASE to Magistrate Judge James M. Hopkins as to Kerri L. Kaley, Brian P. Kaley, Jennifer L. Gruenstrassfor [sic] for all PRETRIAL matters. Signed by Judge Kenneth A. Marra on 4/26/07. (lk) (Entered: 04/27/2007)

04/30/2007	72	Minute Entry for proceedings held before Judge James M. Hopkins:Motion Hearing as to Kerri L. Kaley held on 4/27/2007 re 17 Defendant's MOTION to Vacate, In Whole or In Part, the Protective Order And For a Hearing Concerning the Scope and Legality of the Protective Order Under the Fifth and Sixth Amendments, filed by Kerri L. Kaley,, 52 Defendant's MOTION To Bar Pretrial Restraints Based On A "Facilitation" Theory and Incorporated Memorandul [sic] of Law filed by Kerri L. Kaley, Witness Kerri Kaley &Brian Kaley testified Court Reporter: Victoria Miller (ck) (Entered: 04/30/2007)
04/30/2007	73	Minute Entry for proceedings held before Judge James M. Hopkins :Motion Hearing as to Brian P. Kaley held on 4/27/2007 re 17 Defendant's MOTION to Vacate, In Whole or In Part, the Protective Order And For a Hearing Concerning the Scope and Legality of the Protective Order Under the Fifth and Sixth Amendments filed by Brian P. Kaley,, 52 MOTION filed by Brian P. Kaley, Witness Kerri Kaley &Brian Kaley testified Court Reporter: Victoria Miller (ck) (Entered: 04/30/2007)

04/30/2007	74	EXHIBIT LIST of 4/27/07 hearing by Kerri L. Kaley, Brian P. Kaleym, [sic] with attached exhibits (ck) (Entered: 04/30/2007)
05/01/2007	75	Sealed Document (rb) (Entered: 05/01/2007)
05/01/2007	76	Sealed Document (rb) (Entered: 05/01/2007)
05/01/2007	77	Sealed Document (rb) (Entered: 05/01/2007)
05/01/2007	78	NOTICE *of Filing an Order in United States v. Anders Case No. 04-Cr-20250\Jordan (DE 474)* by Kerri L. Kaley, Brian P. Kaley (Attachments: # 1)(Srebnick, Howard) (Entered: 05/01/2007)
05/02/2007	79	ORDER as to Kerri L. Kaley, Brian. P. Kaley sealed documents 75, 76, &77 Signed by Magistrate Judge James M. Hopkins on 5/1/07. (ck) (Entered: 05/02/2007)
05/02/2007	80	ORDER finding probable cause to seize/freeze or otherwise restrain defendants' principal residence &certificate of deposit as to Kerri L. Kaley, Brian P. Kaley Signed by Magistrate Judge James M. Hopkins on 5/1/07. (ck) (Entered: 05/02/2007)
05/02/2007	81	AMENDED PROTECTIVE ORDER as to Kerri L. Kaley, Brian P. Kaley Signed by Magistrate Judge James

M. Hopkins on 5/1/07. (ck) (Entered: 05/02/2007)

05/02/2007 82 ORDER DENYING 17 Motion to Vacate Protective Order as to Kerri L. Kaley (1), Brian P. Kaley (2); and DENYING 52 Motion to Bar Pretrial Restraints as to Kerri L. Kaley (1), Brian P. Kaley (2)Signed by Magistrate Judge James M. Hopkins on 5/1/07. (ck) (Entered: 05/02/2007)

05/07/2007 87 MOTION for Release of Funds *and to Retain Appellate Counsel* by Kerri L. Kaley, Brian P. Kaley. Responses due by 5/21/2007 (Srebnick, Howard) (Entered: 05/07/2007)

05/07/2007 88 APPEAL OF MAGISTRATE JUDGE DECISION to District Court by Kerri L. Kaley, Brian P. Kaley re 82 Order on Motion to Vacate, Order on Motion for Miscellaneous Relief, (Srebnick, Howard) (Entered: 05/07/2007)

05/09/2007 90 SUPPLEMENT to 88 Appeal of Magistrate Judge Decision to District Court filed by Kerri L. Kaley, by Kerri L. Kaley, Brian P. Kaley *Supplemental Authority in Support of Appeal of Magistrate Judge's Orders* (Srebnick, Howard) (Entered: 05/09/2007)

05/18/2007 99 TRANSCRIPT of Proceedings as to Kerri L. Kaley, Brian P. Kaley held

		on 4/27/07 before Judge James M. Hopkin [sic] . Court Reporter: Victoria Aiello 1-151 pages. (hh) (Entered: 05/22/2007)
05/21/2007	98	RESPONSE by USA as to Kerri L. Kaley, Brian P. Kaley to 87 MOTION for Release of Funds (Lehr, Alison) (Entered: 05/21/2007)
05/24/2007	104	RESPONSE in Support by Kerri L. Kaley, Brian P. Kaley re 87 MOTION for Release of Funds – *Motion to Permit Them to Use untainted assets to repay a loan and to retain appeallate* [sic] *counsel* (Attachments: # 1)(Srebnick, Howard) (Entered: 05/24/2007)
05/25/2007	105	NOTICE *of Filing Frank Tarsia's Sentencing Transcript from Case No. 05-Cr-80192\Ryskamp In Support of Their Objections to Magistrate's Order (DE 88)* by Kerri L. Kaley, Brian P. Kaley (Attachments: # 1 Sentencing Transcript)(Srebnick, Howard) Modified on 6/7/2007 (bs) Added description to attachment. (Entered: 05/25/2007)
05/25/2007	109	RESPONSE by USA as to Kerri L. Kaley, Brian P. Kaley to 88 Appeal of Magistrate Judge Decision to District Court (Lehr, Alison) (Entered: 05/25/2007)

05/30/2007	110	NOTICE *of Filing Frank Tarsia's Plea Transcript in Support of Their Objections (DE 88) to the Magistrates Order* by Kerri L. Kaley, Brian P. Kaley (Srebnick, Howard) (Entered: 05/30/2007)
06/06/2007	112	APPEAL OF MAGISTRATE JUDGE DECISION to District Court by Kerri L. Kaley, Brian P. Kaley re 109 Response (Other) (Van Dusen, Susan) (Entered: 06/06/2007)
06/25/2007	123	OPINION AND ORDER AFFIRMING IN PART AND REVERSING IN PART ORDER OF MAGISTRATE JUDGE overruling in part and sustaining in part objections to order denying defendants' motion to vacate protective order as to Kerri L. Kaley, Brian P. Kaley, Jennifer L. Gruenstrass (see order for further details) Signed by Judge Kenneth A. Marra on 6/25/2007. (mt) (Entered: 06/25/2007)
06/27/2007	124	NOTICE OF APPEAL (Interlocutory) by Kerri L. Kaley, Brian P. Kaley re 123 Order Adopting Report and Recommendations,.Receipt Number: 962396 Filing fee $ 455. (hh) (Entered: 06/28/2007)
06/28/2007		Transmission of Notice of Appeal and Docket Sheet as to Kerri L. Kaley, Brian P. Kaley to US

		Court of Appeals re 124 Notice of Appeal – Interlocutory (hh) (Entered: 06/28/2007)
07/02/2007	125	Defendant's MOTION to Stay *The Arraignment and Trial Pending Appeal of the Pretrial Protective Order* by Kerri L. Kaley, Brian P. Kaley. Responses due by 7/17/2007 (Srebnick, Howard) (Entered: 07/02/2007)
07/10/2007	131	Defendant's MOTION to Continue Trial by Jennifer L. Gruenstrass as to Kerri L. Kaley, Brian P. Kaley, Jennifer L. Gruenstrass. Responses due by 7/24/2007 (Romano, John) (Entered: 07/10/2007)
07/10/2007	132	Defendant's MOTION for Bill of Particulars *and Incorporated Memorandum of Law* by Jennifer L. Gruenstrass. Responses due by 7/24/2007 (Romano, John) (Entered: 07/10/2007)
07/13/2007	133	Supplemental MOTION to Stay *The Arraignment And Trial Pending Appeal Of The PreTrial Protective Order* by Kerri L. Kaley, Brian P. Kaley. Responses due by 7/27/2007 (Attachments: #1 Exhibit A)(Van Dusen, Susan) (Entered: 07/13/2007)
07/13/2007	135	RESPONSE to Motion by USA as to Jennifer L. Gruenstrass re 131 MOTION to Continue Trial

		Replies due by 7/20/2007. (Watts-Fitzgerald, Thomas) (Entered: 07/13/2007)
07/16/2007	136	Minute Entry for proceedings held before Judge Kenneth A. Marra :Motion Hearing as to Kerri L. Kaley, Brian P. Kaley held on 7/16/2007 re 133 MOTION to Stay filed by Brian P. Kaley,, 125 MOTION to Stay filed by Brian P. Kaley, Court Reporter: Stephen Franklin (mt) (Entered: 07/16/2007)
07/18/2007	138	Minute Entry for proceedings held before Judge Kenneth A. Marra :Motion Hearing as to Kerri L. Kaley, Brian P. Kaley held on 7/18/2007 re 133 MOTION to Stay filed by Brian P. Kaley,, 125 MOTION to Stay filed by Brian P. Kaley, Court Reporter: Stephen Franklin (mt) (Entered: 07/18/2007)
07/18/2007	140	ORAL ORDER granting as to Kerri L. Kaley, Brian P. Kaley re 133 MOTION to Stay filed by Brian P. Kaley,, 125 MOTION to Stay filed by Brian P. Kaley. Signed by Judge Kenneth A. Marra on 7/16/2007. (mt) (Entered: 07/18/2007)
07/20/2007	141	Minute Entry for proceedings held before Judge Kenneth A. Marra :Calendar Call as to Jennifer L. Gruenstrass held on 7/20/2007 Case continued to the

		October 29, 2007 trial period. Court Reporter: Stephen Franklin (mt) (Entered: 07/20/2007)
07/20/2007	142	ORDER granting 131 Motion to Continue Trial as to Jennifer L. Gruenstrass (3)Signed by Judge Kenneth A. Marra on 7/20/07. (hd) (Entered: 07/23/2007)
07/26/2007	143	RESPONSE to Motion by USA as to Kerri L. Kaley, Brian P. Kaley, Jennifer L. Gruenstrass re 132 Defendant's MOTION for Bill of Particulars *and Incorporated Memorandum of Law* Replies due by 8/2/2007. (Watts-Fitzgerald, Thomas) (Entered: 07/26/2007)
08/02/2007	147	REPLY TO RESPONSE to Motion by Jennifer L. Gruenstrass re 132 Defendant's MOTION for Bill of Particulars *and Incorporated Memorandum of Law* (Romano, John) (Entered: 08/02/2007)
08/24/2007	149	ORDER Granting in Part 132 Motion for Bill of Particulars as to Jennifer L. Gruenstrass (3). Ordered that the Government identify within ten (10) days of the date of this Order the owners of the prescription medical devices stolen, converted and taken by fraud as alleged in Counts 2-6, the substantive ITSP Counts. Signed by Magistrate Judge James M. Hopkins on

8/24/07.(lw) (Entered: 08/24/2007)

09/04/2007 151 RESPONSE by USA as to Kerri L. Kaley, Brian P. Kaley, Jennifer L. Gruenstrass to 149 Order on Motion for Bill of Particulars, (Watts-Fitzgerald, Thomas) (Entered: 09/04/2007)

09/05/2007 152 TRANSCRIPT of Hearing filed as to Kerri L. Kaley, Brian P. Kaley for dates of 7/16/2007 before Judge Kenneth A. Marra, re 124 Notice of Appeal – Interlocutory Court Reporter: Stephen Franklin – phone number 561-514-3768 1-15 pages. USCA Case Number: 07-13010-HH. (cqs) (Entered: 09/05/2007)

09/11/2007 153 Defendant's MOTION to Compel *Compliance with Court Order dated August 24, 2007* by Jennifer L. Gruenstrass. Responses due by 9/25/2007 (Romano, John) (Entered: 09/11/2007)

09/25/2007 154 RESPONSE to Motion by USA as to Kerri L. Kaley, Brian P. Kaley, Jennifer L. Gruenstrass re 153 Defendant's MOTION to Compel *Compliance with Court Order dated August 24, 2007* Replies due by 10/2/2007. (Watts-Fitzgerald, Thomas) (Entered: 09/25/2007)

10/02/2007 156 REPLY TO RESPONSE to Motion by Jennifer L. Gruenstrass re 153

		Defendant's MOTION to Compel *Compliance with Court Order dated August 24, 2007* (Romano, John) (Entered: 10/02/2007)
10/04/2007)	157	ORDER granting 153 Motion to Compel Compliance as to Jennifer L. Gruenstrass (3)Signed by Magistrate Judge James M. Hopkins on 10/4/07.(lw) (Entered: 10/04/2007)
10/12/2007	158	MOTION to Compel *Court's Order dated October 4, 2007* by Jennifer L. Gruenstrass. Responses due by 10/26/2007 (Romano, John) (Entered: 10/12/2007)
10/15/2007	159	RESPONSE by USA as to Jennifer L. Gruenstrass to 157 Order on Motion to Compel (Watts-Fitzgerald, Thomas) (Entered: 10/15/2007)
10/16/2007	160	ORDER denying 158 Motion for Further Relief as to Jennifer L. Gruenstrass (3)Signed by Judge Kenneth A. Marra on 10/15/2007. (bs) (Entered: 10/16/2007)
11/01/2007	171	Minute Entry for proceedings held before Judge Kenneth A. Marra :Jury Trial as to Jennifer L. Gruenstrass held on 11/1/2007 – Jury Selection only, Trial continued to 11/5/07. Court Reporter: Stephen Franklin – phone number 561-514-3768 (ir) (Entered: 11/05/2007)

11/05/2007	172	Minute Entry for proceedings held before Judge Kenneth A. Marra :Jury Trial as to Jennifer L. Gruenstrass held on 11/5/2007 Court Reporter: Stephen Franklin – phone number 561-514-3768 (ir) (Entered: 11/06/2007)
11/06/2007	173	Minute Entry for proceedings held before Judge Kenneth A. Marra :Jury Trial as to Jennifer L. Gruenstrass held on 11/6/2007 Court Reporter: Stephen Franklin – phone number 561-514-3768 (ir) (Entered: 11/06/2007)
11/07/2007	175	Minute Entry for proceedings held before Judge Kenneth A. Marra :Jury Trial as to Jennifer L. Gruenstrass held on 11/7/2007 Court Reporter: Stephen Franklin – phone number 561-514-3768 (ir) (Entered: 11/07/2007) phone number 561-514-3768 (ir) (Entered: 11/09/2007)
11/08/2007	178	Minute Entry for proceedings held before Judge Kenneth A. Marra :Jury Trial as to Jennifer L. Gruenstrass held on 11/8/2007 Court Reporter: Stephen Franklin – phone number 561-514-3768 (ir) (Entered: 11/09/2007)

11/08/2007	181	JURY VERDICT as to Jennifer L. Gruenstrass (3) Not Guilty on Count 1,1s,2-6,2s-6s,7,7s,8s (ir) (Entered: 11/09/2007)
11/08/2007	183	JUDGMENT OF ACQUITTAL as to Jennifer L. Gruenstrass. Signed by Judge Kenneth A. Marra on 11/8/07. (ir) (Entered: 11/09/2007)
01/04/2008	184	TRANSCRIPT of Jury Trial. Proceedings as to Jennifer L. Gruenstrass held on 11/5/07 before Judge Kenneth A. Marra. Court Reporter: Stephen Franklin – phone number 561-514-3768 1-279 pages. (cqs) (Entered: 01/17/2008)
01/07/2008	185	TRANSCRIPT of Jury Trial Proceedings as to Jennifer L. Gruenstrass held on 11/6/07 before Judge Kenneth A. Marra. Court Reporter: Stephen Franklin – phone number 561-514-3768 293-482 pages. (cqs) (Entered: 01/17/2008)
01/17/2008	186	TRANSCRIPT of Jury Trial Proceedings as to Jennifer L. Gruenstrass held on 11/7/07 before Judge Kenneth A. Marra. Court Reporter: Stephen Franklin – phone number 561-514-3768 483-694 pages. (cqs) (Entered: 01/17/2008)

01/17/2008	187	TRANSCRIPT of Jury Trial Proceedings as to Jennifer L. Gruenstrass held on 11/8/07 before Judge Kenneth A. Marra. Court Reporter: Stephen Franklin – phone number 561-514-3768 695-895 pages. (cqs) (Entered: 01/17/2008)
11/17/2009	188	MANDATE of USCA (certified copy) REVERSING the district court's decision and REMANDING the case to determine the defendant's entitlement to a post – indictment evidentiary hearing with court's opinion as to Kerri L. Kaley, Brian P. Kaley; re 124 Notice of Interlocutory Appeal ; Date Issued: 11/13/2009 ; USCA Case Number: 07-13010-HH (mc) (Entered: 11/18/2009)
11/24/2009	190	Minute Entry for proceedings held before Judge Kenneth A. Marra: Telephonic Status Conference as to Kerri L. Kaley, Brian P. Kaley held on 11/24/2009. Tom Watts-Fitzgerald and Alison Lehr for plaintiff and Howard Srebnick and Susan Van Dusen for defendants. Court Reporter: Stephen Franklin, Phone: 561-514-3768 (ir) (Entered: 11/24/2009)
03/29/2010	193	ORDER GRANTING DEFENDANT'S REQUEST FOR A POST RESTRAINT DUE PROCESS HEARING as to Kerri L. Kaley, Brian P. Kaley.

		Signed by Judge Kenneth A. Marra on 3/29/2010. (ir) (Entered: 03/29/2010)
04/07/2010	194	ORDER as to Kerri L. Kaley, Brian P. Kaley re 193 Order granting Defendant's request for Post Restraint Due Process Hearing. Hearing set for 5/27/2010 10:00 AM in West Palm Beach Division before Judge Kenneth A. Marra. Signed by Judge Kenneth A. Marra on 4/6/2010. (ir) (Entered: 04/07/2010)
05/12/2010	195	Minute Entry for proceedings held before Judge Kenneth A. Marra: Status Conference as to Kerri L. Kaley, Brian P. Kaley held on 5/12/2010. Court Reporter: Stephen Franklin, 561-514-3768/ Stephen_Franklin@flsd.uscourts.gov (ir) (Entered: 05/12/2010)
05/20/2010	196	Memorandum in Support by Kerri L. Kaley, Brian P. Kaley re 52 Defendant's MOTION To Bar Pretrial Restraints Based On A "Facilitation" Theory and Incorporated Memorandul [sic] of Law (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5)(Srebnick, Howard) (Entered: 05/20/2010)
05/20/2010	197	MOTION for Disclosure *of Grand Jury Transcripts* by Kerri L. Kaley, Brian P. Kaley. Responses due by

		6/7/2010 (Srebnick, Howard) (Entered: 05/20/2010)
05/24/2010	198	MOTION for Disclosure *of Agent's Affidavit* by Kerri L. Kaley, Brian P. Kaley. Responses due by 6/10/2010 (Srebnick, Howard) (Entered: 05/24/2010)
05/25/2010	200	MOTION to Quash *Subpoenas* by Johnson &Johnson, Ethicon, Inc., Ethicon Endo-Surgery, Inc. as to Kerri L. Kaley, Brian P. Kaley, Jennifer L. Gruenstrass. Responses due by 6/11/2010 (Attachments: # 1 Exhibit A – Subpoenas)(Beguiristain, Maria) (Entered: 05/25/2010)
05/25/2010	201	MOTION for Hearing re 200 MOTION to Quash *Subpoenas* by Johnson &Johnson, Ethicon, Inc., Ethicon Endo-Surgery, Inc. as to Kerri L. Kaley, Brian P. Kaley, Jennifer L. Gruenstrass. Responses due by 6/11/2010 (Beguiristain, Maria) (Entered: 05/25/2010)
05/26/2010	204	Minute Entry for proceedings held before Judge Kenneth A. Marra: Motion Hearing as to Kerri L. Kaley, Brian P. Kaley held on 5/26/2010 re 200 MOTION to Quash *Subpoenas* filed by Johnson &Johnson, Ethicon, Inc., Ethicon Endo-Surgery, Inc. Court Reporter: Stephen Franklin, 561-514-3768/

Stephen_Franklin@flsd.uscourts.gov (ir) (Entered: 05/26/2010)

06/02/2010 207 TRANSCRIPT of Telephonic Hearing as to Kerri L. Kaley, Brian P. Kaley held on 05/26/2010 before Judge Kenneth A. Marra, 1-28 pages, Court Reporter: Stephen Franklin, 561-514-3768/ Stephen_Franklin@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/28/2010. Redacted Transcript Deadline set for 7/6/2010. Release of Transcript Restriction set for 9/3/2010. (sf) (Entered: 06/02/2010)

06/07/2010 211 RESPONSE in Opposition by USA as to Kerri L. Kaley, Brian P. Kaley re 198 MOTION for Disclosure *of Agent's Affidavit* (Watts-Fitzgerald, Thomas) (Entered: 06/07/2010)

06/18/2010 214 REPLY TO RESPONSE to Motion by Kerri L. Kaley, Brian P. Kaley re 198 MOTION for Disclosure *of Agent's Affidavit* (Srebnick, Howard) (Entered: 06/18/2010)

06/22/2010 216 RESPONSE in Opposition by USA as to Kerri L. Kaley, Brian P. Kaley re 197 MOTION for Disclosure *of*

		Grand Jury Transcripts (Watts-Fitzgerald, Thomas) (Entered: 06/22/2010)
07/02/2010	217	REPLY TO RESPONSE to Motion by Kerri L. Kaley, Brian P. Kaley re 197 MOTION for Disclosure *of Grand Jury Transcripts* (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3)(Srebnick, Howard) (Entered: 07/02/2010)
07/21/2010	218	NOTICE *of Filing: Hearing Exhibits* by Kerri L. Kaley, Brian P. Kaley re 196 Memorandum in Support, (Attachments: #1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, Exhibit 4, # 5 Exhibit 5)(Srebnick, Howard) (Entered: 07/21/2010)
07/27/2010	219	ORDER denying 197 Motion for Disclosure as to Kerri L. Kaley (1), Brian P. Kaley (2); denying 198 Motion for Disclosure as to Kerri L. Kaley (1), Brian P. Kaley (2). Signed by Judge Kenneth A. Marra on 7/27/2010. (ir) (Entered: 07/27/2010)
07/28/2010	220	NOTICE *(Corrected) of Filing Hearing Exhibits* by Kerri L. Kaley, Brian P. Kaley re 196 Memorandum in Support, (Attachments: # 1 Exhibit A (Part 1), # 2 Exhibit A (Part 2), # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D)(Srebnick, Howard) (Entered: 07/28/2010)

07/29/2010	221	SUPPLEMENT to 196 Memorandum in Support, filed by Brian P. Kaley, Kerri L. Kaley by Kerri L. Kaley, Brian P. Kaley *And Summary Of Issues and Evidence for July 29, 2010 Hearing* (Srebnick, Howard) (Entered: 07/29/2010)
07/29/2010	222	Minute Entry for proceedings held before Judge Kenneth A. Marra: Evidentiary Hearing as to Kerri L. Kaley, Brian P. Kaley held on 7/29/2010. Court Reporter: Stephen Franklin, 561-514-3768/ Stephen_Franklin@flsd.uscourts.gov (ir) (Entered: 07/29/2010)
10/25/2010	223	ORDER DENYING as to Kerri L. Kaley, Brian P. Kaley re 17 Defendant's MOTION to Vacate, *In Whole or In Part, the Protective Order And For a Hearing Concerning the Scope and Legality of the Protective Order Under the Fifth and Sixth Amendment* filed by Brian P. Kaley, Kerri L. Kaley. Signed by Judge Kenneth A. Marra on 10/24/2010. (ir) (Entered: 10/25/2010)
10/27/2010	224	NOTICE *Of Appeal* by Kerri L. Kaley, Brian P. Kaley re 223 Order, (Strafer, Guy) Text Modified on 10/27/2010 (cqs). (Entered: 10/27/2010)

11/15/2010	231	TRANSCRIPT of Status Conference as to Kerri L. Kaley, Brian P. Kaley held on 11/24/2009 before Judge Kenneth A. Marra, 1-11 pages, re: 225 Notice of Appeal – Other Order, Court Reporter: Stephen Franklin, 561-514-3768/ Stephen_Franklin@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 12/9/2010. Redacted Transcript Deadline set for 12/20/2010. Release of Transcript Restriction set for 2/16/2011. (sf) (Entered: 11/15/2010)
11/15/2010	232	TRANSCRIPT of Status Conference as to Kerri L. Kaley, Brian P. Kaley held on 05/12/2010 before Judge Kenneth A. Marra, 1-19 pages, re: 225 Notice of Appeal – Other Order, Court Reporter: Stephen Franklin, 561-514-3768/ Stephen_Franklin@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction

		Request due 12/9/2010. Redacted Transcript Deadline set for 12/20/2010. Release of Transcript Restriction set for 2/16/2011. (sf) (Entered: 11/15/2010)
11/15/2010	233	TRANSCRIPT of Evidentiary Hearing as to Kerri L. Kaley, Brian P. Kaley held on 07/29/2010 before Judge Kenneth A. Marra, 1-56 pages, re: 225 Notice of Appeal – Other Order, Court Reporter: Stephen Franklin, 561-514-3768/ Stephen_Franklin@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting the Court Reporter/ Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 12/9/2010. Redacted Transcript Deadline set for 12/20/2010. Release of Transcript Restriction set for 2/16/2011. (sf) (Entered: 11/15/2010)
07/26/2012	249	MANDATE of USCA (certified copy)AFFIRM Judgment/Order of the district court with courts opinion as to Kerri L. Kaley, Brian P. Kaley re 225 Notice of Appeal – Other Order, ; Date Issued: 7/26/2012 ; USCA Case Number: 10-15048 – DD (amb) (Entered: 07/26/2012)

07/31/2012	250	Defendant's MOTION to Stay *Or Continue Arraignment Pending Disposition Of A Petition For Writ Of Certiorari* by Kerri L. Kaley, Brian P. Kaley, responses due by 8/17/2012 (Srebnick, Howard) (Entered: 07/31/2012)
08/14/2012	252	RESPONSE in Opposition by USA as to Kerri L. Kaley, Brian P. Kaley, Jennifer L. Gruenstrass re 250 Defendant's MOTION to Stay *Or Continue Arraignment Pending Disposition Of A Petition For Writ Of Certiorari* MOTION to Continue (Watts-Fitzgerald, Thomas) (Entered: 08/14/2012)
08/21/2012	254	REPLY TO RESPONSE to Motion by Kerri L. Kaley, Brian P. Kaley re 250 Defendant's MOTION to Stay *Or Continue Arraignment Pending Disposition Of A Petition For Writ Of Certiorari* MOTION to Continue (Srebnick, Howard) (Entered: 08/21/2012)
09/18/2012	257	NOTICE *Of Filing Exhibit In Support Of Motion To Stay Or Continue Arraigment* [sic] *Pending the Disposition Of A Petition For Writ of Certiorari (DE 250)* by Kerri L. Kaley, Brian P. Kaley (Attachments: # 1 Exhibit)(Srebnick, Howard) (Entered: 09/18/2012)

09/19/2012	258	Minute Entry for proceedings held before Judge Kenneth A. Marra: Motion Hearing as to Kerri L. Kaley, Brian P. Kaley held on 9/19/2012 re 250 Defendant's MOTION to Stay *Or Continue Arraignment Pending Disposition Of A Petition For Writ Of Certiorari* filed by Brian P. Kaley, Kerri L. Kaley. Tom Watts-Fitzgerald present in person, Howard Srebnick appeared by phone. Court Reporter: Stephen Franklin, 561-514-3768/ Stephen_Franklin@flsd.uscourts.gov (ir) (Entered: 09/19/2012)
09/20/2012	259	ORDER granting 250 Motion to Stay as to Kerri L. Kaley (1), Brian P. Kaley (2); granting 250 Motion to Continue as to Kerri L. Kaley (1), Brian P. Kaley (2). Signed by Judge Kenneth A. Marra on 9/20/2012. (ir) (Entered: 09/20/2012)

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CASE NO. 10-15048-II

04/26/2012	Opinion issued by court as to Appellants Brian P. Kaley and Kerri L. Kaley. Decision: Affirmed. Opinion type: Published. Opinion method: Signed.
04/26/2012	Judgment entered as to Appellants Brian P. Kaley and Kerri L. Kaley.
05/16/2012	Petition for rehearing en banc filed by Appellants Brian P. Kaley and Kerri L. Kaley.
07/17/2012	ORDER: The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled, the Petition(s) for Rehearing En Banc filed by Appellants Kerri L. Kaley and Brian P. Kaley are DENIED.
07/26/2012	Mandate issued as to Appellants Brian P. Kaley and Kerri L. Kaley

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-80021-CR-MARRA/SELTZER

18 U.S.C. § 371
18 U.S.C. § 2314
18 U.S.C. § 1512(b)(3)
18 U.S.C. § 2

UNITED STATES OF AMERICA

v.

KERRI L. KALEY,
BRIAN P. KALEY, and
JENNIFER L. GRUENSTRASS,

Defendants.
_____/

INDICTMENT

(Filed Feb. 6, 2007)

The Grand Jury charges that:

GENERAL ALLEGATIONS

At all times relevant to this Indictment:

1. The federal Food, Drug, and Cosmetic Act (FDCA), as amended, Title 21, United States Code, Section 301 *et seq.*, was in effect.

2. The Food & Drug Administration (FDA), an agency within the United States Department of Health and Human Services, was entrusted by federal law to

enforce provisions of the FDCA and its implementing regulations throughout the United States. It was thus the agency responsible for regulating, among other activities, commerce in prescription medical devices within the United States, because of the potentiality for harmful effect if used other than under the supervision of a practitioner licensed by law.

3. A coconspirator known to the United States maintained a business known as F & S Medical, Inc. (F&S). F&S was a Florida registered corporation with its principal place of business located in Delray Beach, Florida. The known coconspirator solicited sales representatives of medical device manufacturers and others in the medical profession, seeking to purchase prescription medical devices for re-sale.

4. Defendant **KERRI L. KALEY** was employed by Ethicon Endosurgery, Inc. (Ethicon), a subsidiary of Johnson & Johnson, beginning in approximately 1989 and continuing through mid-year 2005. Initially, **KERRI L. KALEY** was a sales representative engaged in the promotion and marketing of Ethicon's products to medical facilities in the New York area. She was subsequently promoted to Division Manager, and became the supervisor of a group of sales representatives in the New York vicinity.

5. Defendant **BRIAN P. KALEY** was the spouse of Kerry [sic] Kaley, and the sole share holder, and director of BKB Construction Corporation and Window Pro, Inc., each of which was a corporation formed under the laws of the State of New York.

6. Defendant **JENNIFER L. GRUENSTRASS**, formerly known Jennifer Heldman, was employed by Ethicon, Inc., another subsidiary of Johnson & Johnson, beginning in approximately July 1990 and continuing through approximately May 2005. Although accorded various titles during the period of her employment, **JENNIFER L. GRUENSTRASS**'s duties involved representing her employer as a sales representative marketing sterile suture material and other product lines.

COUNT 1
(Conspiracy)

1. The allegations contained in paragraphs 1 through 6 of the General Allegations section are realleged and incorporated as though fully set forth herein.

2. Beginning in or around January 1995, and continuing through on or about February 15, 2005, within the Southern District of Florida and elsewhere, the defendants,

KERRI L. KALEY,
BRIAN P. KALEY, and
JENNIFER L. GRUENSTRASS,

and other persons known and unknown to the grand jury, did knowingly and willfully combine, conspire, confederate, and agree to violate the laws of the United States, as set forth below:

A. Transportation of Stolen Property: To knowingly and willfully transport, transfer, and cause to be transported and transferred in interstate commerce, various prescription medical devices, of the value of $5,000 or more, knowing said goods and merchandise to have been stolen, converted, or taken by fraud, in violation of Title 18, United States Code, Section 2314; and

B. Obstruction of an Agency Proceeding: To defraud the United States, that is to hamper, hinder, impede, impair, and obstruct by craft, trickery, deceit, and dishonest means, the lawful and legitimate functions of the FDA in enforcing the federal laws and regulations applicable to prescription medical devices.

Manner and Means

Among the manner and means used by the defendants and their coconspirators, both known and unknown to the grand jury, to effectuate this conspiracy and to further its objectives were the following:

3. It was part of the conspiracy that the defendants and known coconspirators, in the course of their activities as Ethicon employees and otherwise, without the knowledge of Ethicon, secured control and possession of significant quantities of prescription medical devices (PMDs) in the New York area. The PMDs were acquired through a variety of means, including, inter alia, retaining PMDs that were manufactured by companies other than Ethicon when

medical facilities converted to the use of Ethicon devices; Ethicon manufactured PMDs recovered from customer facilities when alternative or later model versions were substituted for earlier models; acquisition of PMDs as "samples" secured directly from Ethicon, which samples were intended for use in medical facilities and by practitioners to promote Ethicon's business; and theft of said devices from the facilities of customers.

4. It was further part of the conspiracy that defendants and coconspirators known to the grand jury periodically packaged and caused to be packaged and shipped, for sale to F&S in interstate commerce the PMDs acquired by the coconspirators, from the residence of defendants **KERRI L. KALEY** and **BRIAN P. KALEY** in Cold Springs Harbor, New York, to F&S at a mail drop located in Delray Beach, Florida, in return for payment from the Florida-based coconspirator. **KERRI L. KALEY** would then deposit and cause to be deposited the payment checks, made out at various times in her name and the names of BKB Construction Corporation and Window Pro, Inc., into various bank accounts, and thereafter issue checks on those accounts, signed by **KERRI L. KALEY**, to defendant **JENNIFER L. GRUENSTRASS** and various of the coconspirators, in payment to them of a portion of the proceeds of the sales of the PMDs.

5. It was further part of the conspiracy that defendants willfully engaged in a pattern of conduct designed to conceal their involvement in the theft,

conversion, and sale of the "misbranded" and "adulterated" PMDs by, inter alia, failing to account for all the income received from the sale of the devices on their tax returns and failing to provide proper documentation of the income distributed to the coconspirators to the Internal Revenue Service.

Overt Acts

In furtherance of the conspiracy and to effect the objects thereof, there was committed and caused to be committed by at least one of the coconspirators herein, within the Southern District of Florida and elsewhere, at least one of the following over [sic] acts, among others:

1. On or about March 26, 1997, **KERRI L. KALEY** and **BRIAN P. KALEY**, at Long Island, New York, shipped and caused to be shipped stolen PMDs to F&S at Delray Beach, Florida, in return for which defendants were paid approximately $4,561.22.

2. On or about March 6, 1998, **KERRI L. KALEY** signed check number 1099 drawn on the business account of BKB Construction Corp., payable to "JENNY HELDMAN" in the amount of $5,500.00.

3. On or about March 27, 1998, **KERRI L. KALEY** and **BRIAN P. KALEY** shipped and caused to be shipped stolen PMDs from New York to F&S at Delray Beach, Florida, in return for which defendants were paid approximately $18,089.24, through a check

drawn on a Barnett Bank account in Boca Raton, Florida, payable to "BKB, Inc.".

4. On or about June 2, 1999, **KERRI L. KALEY** and **BRIAN P. KALEY**, at Long Island, New York, shipped and caused to be shipped stolen PMDs to F&S at Delray Beach, Florida, in return for which defendants were paid approximately $25,264.21.

5. On or about February 10, 2000, **KERRI L. KALEY** and **BRIAN P. KALEY**, at Cold Spring Harbor, New York, shipped and caused to be shipped stolen PMDs to F&S at Delray Beach, Florida, in return for which defendants were paid approximately $35,860.56, against an invoice made out in the name of **KERRI KALEY**, but made payable in the name of "BKB Corp", through a check drawn on an F&S Salomon Smith Barney business account.

6. On or about February 2000, **KERRI L. KALEY** signed three checks, numbered 1414, 1416, and 1422, all drawn on the business account of BKB Construction Corp., payable to a coconspirator known to the grand jury, each in the amount of $5,000.00, which represented payment to the coconspirator for PMDs sold to F&S at Delray Beach, Florida.

7. On or about October 2, 2000, **KERRI L. KALEY** signed check number 1493 drawn on the business account of BKB Construction Corp., payable to "**JEN GREUNSTRAUS** [sic]" in the amount of $8,200.00, which represented her share of a payment for PMDs sold to F&S at Delray Beach, Florida.

8. On or about May 16, 2001, **KERRI L. KALEY** and **BRIAN P. KALEY**, at Cold Spring Harbor, New York, shipped and caused to be shipped stolen PMDs to F&S at Delray Beach, Florida, in return for which defendants were paid approximately $26,121.81, against an invoice made out in the name of **KERRI KALEY**, but made payable in the name of "BKB Corp", through a check drawn on an F&S Salomon Smith Barney business account.

9. On or about May 31, 2001, **KERRI L. KALEY** signed check number 1607 drawn on the business account of BKB Construction Corp., payable to "**JEN GREUNSTRAUSS** [sic]" in the amount of $8,000.00, which represented her share of a payment for PMDs sold to F&S at Delray Beach, Florida.

10. On or about January 14, 2002, **KERRI L. KALEY** and **BRIAN P. KALEY**, at Cold Spring Harbor, New York, shipped and caused to be shipped stolen PMDs to F&S at Delray Beach, Florida, in return for which defendants were paid approximately $22,793.74, against an invoice made out in the name **KERRI KALEY**, but made payable in the name of "WP Inc", through a check drawn on an F&S Salomon Smith Barney business account.

11. On or about April 26, 2002, **KERRI KALEY** signed check number 1142 drawn on the business account of Window Pro, Inc., payable to "**JEN GRUENSTRAUSS** [sic]" in the amount of $8,100.00, which represented her share of a payment for PMDs sold to F&S at Delray Beach, Florida.

12. On or about December 5, 2003, **KERRI L. KALEY** and **BRIAN P. KALEY**, at Cold Spring Harbor, New York, shipped and caused to be shipped stolen PMDs to F&S at Delray Beach, Florida, in return for which defendants were paid approximately $52,954.87, against an invoice made out in the name **KERRI KALEY**, but made payable in the name of "WP Inc", through a check drawn on an F&S Salomon Smith Barney Financial Management Account.

13. On or about December 19, 2003, **KERRI KALEY** signed two checks, numbered 1455 and 1456 drawn on the business account of Window Pro, Inc., payable to a coconspirator known to the grand jury, in the amounts respectively of $5,700.00 and $9,000.00, which represented payment to the coconspirator for PMDs sold to F&S at Delray Beach, Florida.

14. On or about March 5, 2004, **KERRI L. KALEY** and **BRIAN P. KALEY**, at Cold Spring Harbor, New York, shipped and caused to be shipped stolen PMDs to F&S at Delray Beach, Florida, in return for which defendants were paid approximately $147,296.47, against an invoice made out in the name **KERRI KALEY**, but made payable in the name of "WP Inc", through a check drawn on an F&S Salomon Smith Barney Financial Management Account.

15. On or about February 15, 2005, **KERRI L. KALEY** and **BRIAN P. KALEY**, at Cold Spring Harbor, New York, shipped and caused to be shipped stolen PMDs to F&S at Delray Beach, Florida.

All in violation of Title 18, United States Code, Section 371.

COUNTS 2 through 6

(Interstate Transportation of Stolen Property)

1. The allegations contained in paragraphs 1 through 6 of the General Allegations section of this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about the dates identified below with respect to each count, within the Southern District of Florida and elsewhere, the defendants,

KERRI L. KALEY,
BRIAN P. KALEY, and
JENNIFER L. GRUENSTRASS,

did knowingly transport, transmit, and transfer in interstate commerce, from New York to Delray Beach, Florida, goods, wares, and merchandise, that is: prescription medical devices of the value of $5,000 or more, as set forth below, knowing the same to have been stolen, converted, and taken by fraud:

Count	Date	Description
2	04/26/02	Check # 1142; $8,100.00
3	11/01/02	Check # 1237; $7,800.00
4	05/01/03	Check # 1321; $7,000.00
5	08/11/03	Check # 1372; $6,000.00
6	01/05/04	Check # 1485; $3,500.00

In violation of Title 18, United States Code, Sections 2314 and 2.

COUNT 7
(Obstruction of Justice)

1. The allegations contained in paragraphs 1 through 6 of the General Allegations section of this Indictment are realleged and incorporated as though fully set forth herein.

2. On or about January, 2005, the precise date being unknown to the Grand Jury, with the Southern District of Florida being the district in which an official proceeding was intended to be affected, the defendants,

KERRI L. KALEY,
BRIAN P. KALEY, and
JENNIFER L. GRUENSTRASS,

did corruptly attempt to persuade other persons with the intent to delay, and prevent the communication to a law enforcement officer of information relating to the commission or possible commission of a Federal offense.

In violation of Title 18, United States Code, Sections 1512(b)(3) and 2.

CRIMINAL FORFEITURE

1. The allegations of this Indictment are realleged and incorporated by reference herein as if set

forth in their entirety, for the purpose of alleging forfeitures to the United States of America, of property in which the defendants have an interest, pursuant to the provisions of Title 28, United States Code, Section 2461 and Title 18, United States Code, Section 981(a)(1)(C).

2. Upon conviction of the offenses alleged in Counts 1 through 6 of this Indictment, defendants **KERRI L. KALEY**, **BRIAN P. KALEY**, and **JENNIFER L. GRUENSTRASS** shall forfeit to the United States all property, real and personal, constituting proceeds obtained from the afore stated offense(s) and all property traceable to such property, including but not limited to a money judgment in the amount of $2,195,635.28 and the certificate of deposit, ending in "9628," held at the Bank of America, Utica, New York, in the name of Kerri L. Winans-Kaley and Brian P. Kaley.

All pursuant to Title 28, United States Code, Section 2461; Title 18, United States Code, Section 981(a)(1)(C) and the procedures outlined at Title 21, United States Code, Section 853.

/s/ [Illegible]
R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

/s/ Thomas Watts-FitzGerald
Thomas Watts-FitzGerald
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

KERRI L. KALEY, ET AL.

Defendants. _____/

CASE NO. _____

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

Court Division: (Select One)

_____ Miami _____ Key West
_____ FTL __X__ WPB _____ FTP

New Defendant(s) Yes _____ No _____
Number of New Defendants _____
Total number of counts _____

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under

---

* [Penalty Sheets Omitted In Printing]

the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) No
   List language and/or dialect _____

4. This case will take 10 days for the parties to try.

5. Please check appropriate category and type of offense listed below:

	(Check only one)		(Check only one)	
I	0 to 5 days	____	Petty	____
II	6 to 10 days	X	Minor	____
III	11 to 20 days	____	Misdem.	____
IV	21 to 60 days	____	Felony	X
V	61 days and over	____		

6. Has this case been previously filed in this District Court: (Yes or No) Yes

If yes:

Judge: Kenneth Ryskamp

Case No. 05-80199-CR-RYSKAMP

(Attach copy of dispositive order)

Has a complaint been filed in this matter?

(Yes or No) No

If yes:

Magistrate Case No.

_____

Related Miscellaneous numbers:

_____

Defendant(s) in federal custody as of

_____

Defendant(s) in state custody as of

_____

Rule 20 from the _____ District of _____
Is this a potential death penalty case?
(Yes or No) No

7. Does this case originate from a matter pending in the U.S. Attorney's Office prior to April 1, 2003? _____ Yes X No

8. Does this case originate from a matter pending in the U. S. Attorney's Office prior to April 1, 1999? _____ Yes X No
If yes, was it pending in the Central Region? ____ Yes ____ No

9. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003?
____ Yes X No

10. Does this case originate from a matter pending in the Narcotics Section (Miami) prior to May 18, 2003? _____ Yes X No

/s/ Thomas Watts-Fitzgerald
THOMAS WATTS-FITZGERALD
ASSISTANT UNITED
STATES ATTORNEY
FL. Bar No. 0273538

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-80021-CR-MARRA/SELTZER

UNITED STATES
OF AMERICA

v.

KERRI L. KALEY,
BRIAN P. KALEY, and
JENNIFER L. GRUENSTRASS,

Defendants.
_____/

PROTECTIVE ORDER

(Filed Feb. 8, 2007)

THIS MATTER came before the Court on the motion of the United States of America for entry of a Post Indictment Protective Order pursuant to 21 U.S.C. § 853 and the Court having reviewed the *Ex Parte* Motion for Protective Order and Memorandum of Law, and the Indictment returned in this matter, finds that probable cause has been shown for the entry of a protective order to preserve the property named herein for forfeiture based upon the following:

1. On or about February 6, 2007, the defendants were indicted by a federal grand jury in the Southern District of Florida for engaging, inter alia, in a conspiracy to violate, and violations of 18 U.S.C. § 2314. The indictment alleges and establishes that the defendants engaged in interstate transportation of goods or merchandise, valued in excess of $5,000, knowing

such goods and merchandise to have been stolen, converted or taken by fraud, in violation of 18 U.S.C. § 2314.

2. The indictment also alleges that upon conviction of any violation of 18 U.S.C. § 2314 the defendants shall forfeit to the United States all property, real and personal, constituting proceeds obtained from the offenses and all property traceable to such property including a money judgment in the amount of $2,195,635.28 and a certificate of deposit, ending in digits 9628, held at the Bank of America, Utica, New York in the name of Kerri L. Winans-Kaley and Brian P. Kaley.

3. The United States seeks the protective order to prevent the transfer, alienation, encumbrance or dissipation of the subject property by the defendants or any third party which would render said property unavailable for forfeiture.

4. Pursuant to 21 U.S.C. § 853(e), the Court is authorized to enter a restraining order or injunction, require the execution of satisfactory performance bond, or take any other action to preserve the availability of property subject to forfeiture.

5. The federal grand jury's indictment of the defendants, which specifically identified property as being subject to forfeiture under 18 U.S.C. §1963(a), establishes sufficient probable cause for the issuance of the requested protective order.

6. The need to preserve the availability of the subject property through the entry of the order requested herein outweighs the hardship on any party against whom the order is to be entered.

7. Any third party claims to the subject property may be properly brought and resolved in ancillary proceedings conducted by this Court following the execution of a Preliminary Order of Forfeiture in accordance with the provisions of federal forfeiture law.

Accordingly, it is ORDERED that:

A. Effective immediately, defendants, their agents, servants, employees, attorneys, family members and those persons in active concert or participation with them, and those persons, financial institutions, or other entities who have any interest or control over the subject property are hereby RESTRAINED, ENJOINED, AND PROHIBITED, without prior approval of this Court and upon notice to the United States and an opportunity for the United States to be heard, from attempting or completing any action that would affect the availability, marketability or value of said property, including but not limited to withdrawing, transferring, selling, assigning, pledging, distributing, encumbering, wasting, secreting, depreciating, damaging, or in any way diminishing the value of, all or any part of their interest, direct or indirect, in the property listed for forfeiture in the indictment, including the certificate of deposit, ending in digits 9628, held at the Bank of America, Utica, New York

in the name of Kerri L. Winans-Kaley and Brian P. Kaley.

An authorized agent of the United States shall promptly serve a copy of this Restraining Order upon defendants, and make a return thereon reflecting the date and time of service. Notice of the entry of this Order may also be given by facsimile transmission. In addition, a copy of this Order shall be served, by facsimile or other method, upon Bank of America. The Bank of America shall respond promptly to requests by the Government for information on the background and/or status of the certificate.

This Protective Order shall remain in full force and effect until further order of this Court.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 7th day of February, 2007.

/s/ Kenneth A. Marra
KENNETH A. MARRA
UNITED STATES
DISTRICT JUDGE

Copies furnished to:

AUSA Tom Watts-Fitzgerald
AUSA Alison Lehr (5 certified copies, please)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-80021-CR-MARRA/HOPKINS(S)

18 U.S.C. § 371
18 U.S.C. § 1956(h)
18 U.S.C. § 2314
18 U.S.C. § 1512(a)(3)
18 U.S.C. § 2

UNITED STATES OF AMERICA

v.

KERRI L. KALEY,
BRIAN P. KALEY, and
JENNIFER L. GRUENSTRASS,

Defendants.
_____/

INDICTMENT

(Filed Apr. 10, 2007)

The Grand Jury charges that:

GENERAL ALLEGATIONS

At all times relevant to this Indictment:

1. The federal Food, Drug, and Cosmetic Act (FDCA), as amended, Title 21, United States Code, Section 301 *et seq.*, was in effect.

2. The Food & Drug Administration (FDA), an agency within the United States Department of Health

and Human Services, was entrusted by federal law to enforce provisions of the FDCA and its implementing regulations throughout the United States. It was thus the agency responsible for regulating, among other activities, commerce in prescription medical devices within the United States, because of the potentiality for harmful effect if used other than under the supervision of a practitioner licensed by law.

3. A coconspirator known to the United States maintained a business known as F & S Medical, Inc. (F&S). F&S was a Florida registered corporation with its principal place of business located in Delray Beach, Florida. The known coconspirator solicited sales representatives of medical device manufacturers and others in the medical profession, seeking to purchase prescription medical devices for re-sale.

4. Defendant **KERRI L. KALEY** was employed by Ethicon Endosurgery, Inc. (Ethicon), a subsidiary of Johnson & Johnson, beginning in approximately 1989 and continuing through mid-year 2005. Initially, **KERRI L. KALEY** was a sales representative engaged in the promotion and marketing of Ethicon's products to medical facilities in the New York area. She was subsequently promoted to Division Manager, and became the supervisor of a group of sales representatives in New York.

5. Defendant **BRIAN P. KALEY** was the spouse of Kerry [sic] Kaley, and the sole share holder, and director of BKB Construction Corporation and Window Pro, Inc., each of which was a corporation formed

under the laws of the State of New York and which maintained its principal place of business at 34 Snowball Drive, Cold Spring Harbor, New York.

6. Defendant **JENNIFER L. GRUENSTRASS**, formerly known Jennifer Heldman, was employed by Ethicon, Inc., another subsidiary of Johnson & Johnson, beginning in approximately July 1990 and continuing through approximately May 2005. Although accorded various titles during the period of her employment, **JENNIFER L. GRUENSTRASS**'s duties involved representing her employer as a sales representative marketing sterile suture material and other product lines.

COUNT 1
(Conspiracy)

1. The allegations contained in paragraphs 1 through 6 of the General Allegations section of this Indictment are re-alleged and incorporated as though fully set forth herein.

2. Beginning in or around January 1995, and continuing through on or about February 15, 2005, within the Southern District of Florida and elsewhere, the defendants,

KERRI L. KALEY,
BRIAN P. KALEY, and
JENNIFER L. GRUENSTRASS,

and other persons known and unknown to the grand jury, did willfully, that is, with the intent to further

the objects of the conspiracy, and knowingly combine, conspire, confederate, and agree:

A. Transportation of Stolen Property: To violate the laws of the United States, that is to knowingly transport, transfer, and cause to be transported and transferred in interstate commerce, various prescription medical devices, of the value of $5,000 or more, knowing said goods and merchandise to have been stolen, converted, or taken by fraud, in violation of Title 18, United States Code, Section 2314; and

B. Obstruction of an Agency Proceeding: To defraud the United States, that is to hamper, hinder, impede, impair, and obstruct by craft, trickery, deceit, and dishonest means, the lawful and legitimate functions of the FDA in enforcing the federal laws and regulations applicable to prescription medical devices.

Manner and Means

Among the manner and means used by the defendants and their coconspirators, both known and unknown to the grand jury, to effectuate this conspiracy and to further its objectives were the following:

3. It was part of the conspiracy that the defendants and known coconspirators, in the course of their activities as Ethicon employees and otherwise, without the knowledge of Ethicon, secured control and possession of significant quantities of prescription

medical devices (PMDs) in the New York area. The PMDs were acquired through a variety of means, including, inter alia, retaining PMDs that were manufactured by companies other than Ethicon when medical facilities converted to the use of Ethicon devices; Ethicon manufactured PMDs recovered from customer facilities when alternative or later model versions were substituted for earlier models; acquisition of PMDs as "samples" secured directly from Ethicon, which samples were intended for use in medical facilities and by practitioners to promote Ethicon's business; and theft of said devices from the facilities of customers.

4. It was further part of the conspiracy that defendants and coconspirators known to the grand jury periodically packaged and caused to be packaged and shipped, for sale to F&S in interstate commerce the PMDs acquired by the coconspirators, from the residence of defendants **KERRI L. KALEY** and **BRIAN P. KALEY** in Cold Spring Harbor, New York, to F&S at a mail drop located in Delray Beach, Florida, in return for payment from the Florida-based coconspirator. **KERRI L. KALEY** would then deposit and cause to be deposited the payment checks, made out at various times in her name and the names of BKB Construction Corporation and Window Pro, Inc., into various bank accounts, and thereafter issue checks on those accounts, signed by **KERRI L. KALEY**, to defendant **JENNIFER L. GRUENSTRASS** and various of the coconspirators, in payment to them of a portion of the proceeds of the sales of the PMDs.

5. It was further part of the conspiracy that defendants willfully engaged in a pattern of conduct designed to conceal their involvement in the theft, conversion, and sale of the "misbranded" and "adulterated" PMDs by, inter alia, failing to account for all the income received from the sale of the devices on their tax returns and failing to provide proper documentation of the income distributed to the coconspirators to the Internal Revenue Service.

Overt Acts

In furtherance of the conspiracy and to effect the objects thereof, there was committed and caused to be committed by at least one of the coconspirators herein, within the Southern District of Florida and elsewhere, at least one of the following over [sic] acts, among others:

1. On or about March 26, 1997, **KERRI L. KALEY** and **BRIAN P. KALEY**, at Long Island, New York, shipped and caused to be shipped stolen PMDs to F&S at Delray Beach, Florida, in return for which defendants were paid approximately $4,561.22.

2. On or about March 6, 1998, **KERRI L. KALEY** signed check number 1099 drawn on the business account of BKB Construction Corp., payable to "**JENNY HELDMAN**" in the amount of $5,500.00.

3. On or about March 27, 1998, **KERRI L. KALEY** and **BRIAN P. KALEY** shipped and caused to be shipped stolen PMDs from New York to F&S at

Delray Beach, Florida, in return for which defendants were paid approximately $18,089.24, through a check drawn on a Barnett Bank account in Boca Raton, Florida, payable to "BKB, Inc.".

4. On or about June 2, 1999, **KERRI L. KALEY** and **BRIAN P. KALEY**, at Long Island, New York, shipped and caused to be shipped stolen PMDs to F&S at Delray Beach, Florida, in return for which defendants were paid approximately $25,264.21.

5. On or about February 10, 2000, **KERRI L. KALEY** and **BRIAN P. KALEY**, at Cold Spring Harbor, New York, shipped and caused to be shipped stolen PMDs to F&S at Delray Beach, Florida, in return for which defendants were paid approximately $35,860.56, against an invoice made out in the name of **KERRI KALEY**, but made payable in the name of "BKB Corp", through a check drawn on an F&S Salomon Smith Barney business account.

6. On or about February 2000, **KERRI L. KALEY** signed three checks, numbered 1414, 1416, and 1422, all drawn on a business account of BKB Construction Corp., payable to a coconspirator known to the grand jury, each in the amount of $5,000.00, which represented payment to the coconspirator for PMDs sold to F&S at Delray Beach, Florida.

7. On or about October 2, 2000, **KERRI L. KALEY** signed check number 1493 drawn on the business account of BKB Construction Corp., payable to "**JEN GREUNSTRAUS** [sic]" in the amount of $8,200.00,

which represented her share of a payment for PMDs sold to F&S at Delray Beach, Florida.

8. On or about May 16, 2001, **KERRI L. KALEY** and **BRIAN P. KALEY**, at Cold Spring Harbor, New York, shipped and caused to be shipped stolen PMDs to F&S at Delray Beach, Florida, in return for which defendants were paid approximately $26,121.81, against an invoice made out in the name of **KERRI KALEY**, but made payable in the name of "BKB Corp", through a check drawn on an F&S Salomon Smith Barney business account.

9. On or about May 31, 2001, **KERRI L. KALEY** signed check number 1607 drawn on the business account of BKB Construction Corp., payable to **"JEN GREUNSTRAUSS"** in the amount of $8,000.00, which represented her share of a payment for PMDs sold to F&S at Delray Beach, Florida.

10. On or about January 14, 2002, **KERRI L. KALEY** and **BRIAN P. KALEY**, at Cold Spring Harbor, New York, shipped and caused to be shipped stolen PMDs to F&S at Delray Beach, Florida, in return for which defendants were paid approximately $22,793.74, against an invoice made out in the name **KERRI KALEY**, but made payable in the name of "WP Inc", through a check drawn on an F&S Salomon Smith Barney business account.

11. On or about April 26, 2002, **KERRI KALEY** signed check number 1142 drawn on the business account of Window Pro, Inc., payable to "**JEN GRUENSTRAUSS** [sic]" in the amount of $8,100.00,

which represented her share of a payment for PMDs sold to F&S at Delray Beach, Florida.

12. On or about December 5, 2003, **KERRI L. KALEY** and **BRIAN P. KALEY**, at Cold Spring Harbor, New York, shipped and caused to be shipped stolen PMDs to F&S at Delray Beach, Florida, in return for which defendants were paid approximately $52,954.87, against an invoice made out in the name **KERRI KALEY**, but made payable in the name of "WP Inc", through a check drawn on an F&S Salomon Smith Barney Financial Management Account.

13. On or about December 19, 2003, **KERRI KALEY** signed two checks, numbered 1455 and 1456 drawn on the business account of Window Pro, Inc., payable to a coconspirator known to the grand jury, in the amounts respectively of $5,700.00 and $9,000.00, which represented payment to the coconspirator for PMDs sold to F&S at Delray Beach, Florida.

14. On or about March 5, 2004, **KERRI L. KALEY** and **BRIAN P. KALEY**, at Cold Spring Harbor, New York, shipped and caused to be shipped stolen PMDs to F&S at Delray Beach, Florida, in return for which defendants were paid approximately $147,296.47, against an invoice made out in the name **KERRI KALEY**, but made payable in the name of "WP Inc", through a check drawn on an F&S Salomon Smith Barney Financial Management Account.

15. On or about February 15, 2005, **KERRI L. KALEY** and **BRIAN P. KALEY**, at Cold Spring Harbor, New York, shipped and caused to be shipped stolen PMDs to F&S at Delray Beach, Florida.

All in violation of Title 18, United States Code, Section 371.

COUNTS 2 through 6

(Interstate Transportation of Stolen Property)

1. The allegations contained in paragraphs 1 through 6 of the General Allegations section of this Indictment are re-alleged and incorporated as though fully set forth herein.

2. On or about the dates identified below with respect to each count, within the Southern District of Florida and elsewhere, the defendants,

KERRI L. KALEY,
BRIAN P. KALEY, and
JENNIFER L. GRUENSTRASS,

did knowingly transport, transmit, and transfer in interstate commerce, from New York to Delray Beach, Florida, goods, wares, and merchandise, that is: prescription medical devices of the value of $5,000 or more, as set forth below, knowing the same to have been stolen, converted, and taken by fraud:

Count	Date	Description
2	04/26/02	Check # 1142; $8,100.00
3	11/01/02	Check # 1237; $7,800.00
4	05/01/03	Check # 1321; $7,000.00
5	08/11/03	Check # 1372; $6,000.00
6	01/05/04	Check # 1485; $3,500.00

All in violation of Title 18, United States Code, Sections 2314 and 2.

COUNT 7

(Money Laundering Conspiracy)

1. The allegations contained in paragraphs 1 through 6 of the General Allegations section of this Indictment are re-alleged and incorporated as though fully set forth herein.

2. From in or around January 1995, and continuing through on or about February 15, 2005, within the Southern District of Florida, and elsewhere, the defendants,

KERRI L. KALEY,
BRIAN P. KALEY, and
JENNIFER L. GRUENSTRASS,

did willfully, that is, with the intent to further the object of the conspiracy, and knowingly combine, conspire, confederate, and agree with persons known and unknown to the Grand Jury to commit a violation of Title 18, United States Code, Section 1956(a)(1)(B)(i), that is: to knowingly conduct financial transactions affecting interstate commerce and involving the proceeds of specified unlawful activity, knowing that the property involved in such financial transactions represented the proceeds of some form of unlawful activity, and knowing that such transactions were designed in whole and in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of specified unlawful activity.

It is further alleged that the specified unlawful activity is the interstate transportation of stolen property, in violation of Title 18, United States Code, Section 2314.

All in violation of Title 18, United States Code, Sections 1956(h).

COUNT 8
(Obstruction of Justice)

1. The allegations contained in paragraphs 1 through 6 of the General Allegations section of this Indictment are re-alleged and incorporated as though fully set forth herein.

2. On or about January, 2005, the precise date being unknown to the Grand Jury, with the Southern District of Florida being the district in which an official proceeding was intended to be affected, the defendants,

KERRI L. KALEY,
BRIAN P. KALEY, and
JENNIFER L. GRUENSTRASS,

did corruptly attempt to persuade other persons with the intent to delay, and prevent the communication to a law enforcement officer of information relating to the commission or possible commission of a Federal offense.

All in violation of Title 18, United States Code, Sections 1512(b)(3) and 2.

CRIMINAL FORFEITURE

1. The allegations of this Indictment are re-alleged and incorporated by reference herein as if set forth in their entirety, for the purpose of alleging forfeitures to the United States of America, of property in which the defendants have an interest, pursuant to the provisions of Title 28, United States Code, Section 2461 and Title 18, United States Code, Sections 981(a)(1)(C) and 982(a)(1).

2. Upon conviction of any of the offenses alleged in Counts 1 through 6 of this Indictment, defendants **KERRI L. KALEY, BRIAN P. KALEY**, and **JENNIFER L. GRUENSTRASS** shall forfeit to the United States all property, real and personal, constituting proceeds obtained from the afore stated offenses and all property traceable to such property.

3. Upon conviction of the offense alleged in Count 7 of this Indictment, defendants **KERRI L. KALEY, BRIAN P. KALEY**, and **JENNIFER L. GRUENSTRASS** shall forfeit to the United States all property, real and personal, involved in such offense or traceable to such property.

4. The property subject to forfeiture includes but is not limited to:

a. A money judgment in the amount of $2,195,635.28;

b. A certificate of deposit, ending in "2727" held at the Bank of America, Utica, New York, in the name Kerri L. Kaley and Brian P. Kaley; and

c. The real property located at 34 Snowball Drive, Cold Spring Harbor, New York.

5. Pursuant to the provisions of Title 18, United States Code § 982(b)(1), Title 28, United States Code, Section 2461(c) and Title 21, United States Code, Section 853(p), if any of the property described above:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be subdivided without difficulty;

the Court shall order the forfeiture of any other property belonging to the defendants up to the value of the above-described property to satisfy the forfeiture.

All pursuant to Title 28, United States Code, Section 2461; Title 18, United States Code, Sections

981(a)(1)(C) and 982(a)(1), and the procedures outlined at Title 21, United States Code, Section 853.

A TRUE BILL

FOREPERSON

/s/ [Illegible]
R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

/s/ Thomas Watts-FitzGerald
Thomas Watts-FitzGerald
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

vs.

KERRI L. KALEY, ET AL.

Defendants.
_____/

CASE NO.
07-80021-CR-MARRA (S)

CERTIFICATE OF TRIAL ATTORNEY*

Superseding Case Information:

Court Division: (Select One)

_____ Miami _____ Key West
_____ FTL ___X___ WPB _____ FTP

New Defendant(s) Yes ___X___ No _____
Number of New Defendants _____
Total number of counts ___8___

I do hereby certify that:

1. I have carefully considered the allegations of the indictment, the number of defendants, the number of probable witnesses and the legal complexities of the Indictment/Information attached hereto.

2. I am aware that the information supplied on this statement will be relied upon by the Judges of this Court in setting their calendars and scheduling criminal trials under

---

* [Penalty Sheets Omitted In Printing]

the mandate of the Speedy Trial Act, Title 28 U.S.C. Section 3161.

3. Interpreter: (Yes or No) No
   List language and/or dialect _____

4. This case will take 10 days for the parties to try.

5. Please check appropriate category and type of offense listed below:
   (Check only one)

I	0 to 5 days	_____	Petty	_____
II	6 to 10 days	X	Minor	_____
III	11 to 20 days	_____	Misdem.	_____
IV	21 to 60 days	_____	Felony	X
V	61 days and over	_____		

6. Has this case been previously filed in this District Court: (Yes or No) Yes

If yes:

Judge: Kenneth A Marra

Case No. 07-80021-CR-MARRA

(Attach copy of dispositive order)

Has a complaint been filed in this matter?

(Yes or No) No

If yes:

Magistrate Case No.

_____

Related Miscellaneous numbers:

_____

Defendant(s) in federal custody as of

_____

Defendant(s) in state custody as of

_____

Rule 20 from the _____ District of _____
Is this a potential death penalty case?
(Yes or No) No

7. Does this case originate from a matter pending in the U.S. Attorney's Office prior to April 1, 2003? _____ Yes X No

8. Does this case originate from a matter pending in the U. S. Attorney's Office prior to April 1, 1999? _____ Yes X No
If yes, was it pending in the Central Region? ____ Yes ____ No

9. Does this case originate from a matter pending in the Northern Region of the U.S. Attorney's Office prior to October 14, 2003?
____Yes X No

10. Does this case originate from a matter pending in the Narcotics Section (Miami) prior to May 18, 2003? _____ Yes X No

/s/ Thomas A. Watts-Fitzgerald
THOMAS WATTS-FITZGERALD
ASSISTANT UNITED
STATES ATTORNEY
Florida Bar No. 0273538

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-80021-CR-MARRA/HOPKINS

UNITED STATES OF AMERICA

v.

KERRI L. KALEY,
BRIAN P. KALEY, and
JENNIFER L. GRUENSTRASS,

Defendants. /

AMENDED PROTECTIVE ORDER

(Filed May 2, 2007)

THIS MATTER came before the Court after a hearing as to the pre-trial restraint of certain items sought for forfeiture by the United States. The Court, having received evidence and having made certain findings with respect to defendants' financial wherewithal, ordered the United States to submit an affidavit in support of a probable cause determination regarding the two assets at issue: defendants' principal residence and the certificate of deposit ending in digits 2727, held at the Bank of America, Utica, New York in the name of Kerri L. Winans-Kaley and Brian P. Kaley. The Court based its Order, in part, on the provision in *United States v. Bissell,* 866 F.2d 1343, 1354 (11th Cir. 1989) where the court approves "the district court's probable cause determinations provided a significant check on the government's power to restrain legitimate nonindicted assets."

The Court having reviewed the Sealed *Ex Parte* Declaration of Special Agent Daniel A. Minsker in Support of Probable Cause Determination as to Restraint of the Principal Residence and the Certificate of Deposit, as well as the Superseding Indictment returned in this matter, finds that probable cause has been shown for the entry of a protective order to preserve the property named herein for forfeiture.

Accordingly, it is ORDERED that:

A. Effective immediately, defendants, their agents, servants, employees, attorneys, family members and those persons in active concert or participation with them, and those persons, financial institutions, or other entities who have any interest or control over the subject property are hereby RESTRAINED, ENJOINED, AND PROHIBITED, without prior approval of this Court and upon notice to the United States and an opportunity for the United States to be heard, from attempting or completing any action that would affect the availability, marketability or value of said property, including but not limited to withdrawing, transferring, selling, assisting, pledging, distributing, encumbering, wasting, secreting, depreciating, damaging, or in any way diminishing the value of, all or any part of their interest, direct or indirect, in the property listed for forfeiture in the indictment, including the certificate of deposit, ending in digits 2727, held at the Bank of America, Utica, New York in the name of Kerri L. Winans-Kaley and Brian P. Kaley and the principal residence of the defendants

located at 34 Snowball Drive, Cold Spring Harbor, New York.

This Protective Order shall remain in full force and effect until further order of this Court.

DONE AND ORDERED in Chambers, West Palm Beach, Florida, this 1 day of May, 2007.

/s/ James M. Hopkins
JAMES A. HOPKINS
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-80021-CR-MARRA
Magistrate Judge Hopkins

UNITED STATES OF AMERICA

v.

JENNIFER L. GRUENSTRASS,

Defendant. /

GOVERNMENT'S RESPONSE TO MOTION TO CONTINUE

(Filed Jul. 13, 2007)

The United States hereby files this Response to the Motion To Continue filed on behalf of defendant Gruenstrass, and respectfully prays this Honorable Court to deny said Motion in all respects and in support thereof would show:

Defendant was charged in a multi-count, multi-defendant Indictment on February 6, 2007.

As the Court is aware, the co-defendants herein are yet to be arraigned as they have not retained permanent counsel. A variety of collateral proceedings have been held with respect to the codefendants addressing their ability to meet the fee requirements of their temporary counsel. Rejecting this Court's ruling on the issues raised, codefendants have sought interlocutory review in the Eleventh Circuit. Resolution of the issues they raise is expected to take some time.

Defendant Gruenstrass, despite the completion of discovery by the United States in a timely manner, and the passage of six months, seeks to postpone her trial in this matter on essentially two bases: trial efficiency and convenience of witnesses. It is the government's position that neither of these factors, singly or in concert are sufficient to warrant the delay suggested by the defense, and the United States certainly disagrees with the claim on Motion such a delay "serves the interests of all trial participants."

Economy of Resources

Defendant Gruenstrass characterizes this matter as atypical in the sense that severance would not shorten the aggregate time of trial and suggests that trial duration has been estimated to be from 7-10 days. In fact, to the government's recollection, a lengthier time frame, of two to three weeks has been suggested by counsel for codefendants during hearings in this matter. Indeed, the government is somewhat perplexed that the defendant is not highly receptive to a severed trial, since concern for possible "spill-over effects" in conspiracy and other multiple-defendant cases is the more common refrain heard from a defendant who may profitably be able to argue such claims as mere presence, reduced culpability, or similar "shifting blame" defenses in the absence of codefendants at the trial bar. While trial tactics are the purview of each counsel, the United States believes there are economies to be realized by a severed proceeding.

Witness Convenience

Defendant does not identify the number or location of the witnesses she feels will be inconvenienced by having to attend a Florida trial, but seems to suggest all the witnesses would necessarily testify in any case against her and the case, if separately tried, of the codefendants. Absent specifics, the government does not believe such a scenario is likely. While there will manifestly be some overlap in the government's witnesses against all 3 defendants, defense witnesses are likely to be less inclusive.

The government has a significant number of the most important witnesses in the South Florida area, and some witnesses who are likely to be either in custody or otherwise subject to federal control when their testimony is needed. Given the status of these witnesses, possible multiple appearances are not an issue. The considerations of hardship and expense suggested by defendant are simply insufficient in the government's view to delay resolution of the charges, that stem from activities extending to as early as January 1995; the more significant issue is the possible progressive loss of memory and availability of witnesses, not that some might need to appear twice.

Conclusion

The United States would respectfully suggest that the granting of this Motion will have the effect of unreasonably delaying resolution of the charges against this defendant for an extended period of time,

in light of the interlocutory appeal now lodged with the Eleventh Circuit by the codefendants. Even an expedited resolution of that matter is unlikely to see the codefendants available for trial until late in 2008.[1] Such a delay is not consistent with the public interest in this matter and not cured simply by defendant's abbreviated agreement to waive her speedy trial rights.[2] Indeed, Section 3161(h)(4) would seem to bar the lengthy delay that would attend holding defendant Gruenstrass' case in abeyance pending the resolution of the matters raised by the codefendants, against whom the speedy clock is tolled. A delay that may approach or even exceed a year solely on issues unrelated to the instant defendant simply would not satisfy the standard of reasonableness in Section 3161(h)(4).

---

[1] Current counsel for codefendants have stated they require 10 full weeks of preparation time once permanently in the case. Presumably alternate counsel, not having been involved for the lengthy time the current counsel have had to become familiar with the case, would require even longer – all after final decision by the Eleventh Circuit and the play-out of any further review efforts.

[2] Allowing defendants, the government, and even the Court to simply accept such waivers has been subject to close scrutiny of late, resulting in a clear rule that the prevailing interest in the analysis of any possible waiver is the public interests firmly enshrined in the Speedy Trial Act, Title 18, United States Code, Section 3161. *See Zedner v. United States*, ___ U.S. ___, 126 S. Ct. 1976, 1983-86 (2006) (" . . . the Act was designed not just to benefit defendants but also to serve the public interest. . .").

A reasonable delay to allow preparation of a defense for presentation at a severed trial is the appropriate course in this matter. Coupled with a special setting to allow for the coordination of travel and appearance by out-of area witnesses, the witness concerns voiced by defendant on Motion would be reasonably addressed and the public interest in this matter amply served.

Accordingly, the United States prays this Honorable Court will deny the instant Motion, accept defendants proffered Speedy Trial Act waiver only to the extent of a reasonable delay of 30 to 45 days to allow preparation and adjustment occasioned by the severance or her case, and specially set this matter for trial. The United States believes that defendants trial under these circumstances can be completed in approximately 5 trial days.

Respectfully submitted,

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

By: s/ Thomas A. Watts-FitzGerald
Assistant U. S. Attorney
Florida Bar No. 0273538
99 Northeast 4th Street
Miami, Florida 33132-2111
Tel: (305) 961-9413
Fax: (305) 536-4651

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-80021-CR-MARRA(S)
Magistrate Judge Hopkins

UNITED STATES OF AMERICA

v.

JENNIFER L. GRUENSTRASS,

Defendant.
_____/

GOVERNMENT'S RESPONSE TO MAGISTRATE'S ORDER

[Oct. 15, 2007]

The United States hereby files this response to the Order [DE-157] entered in this matter by the Honorable James Hopkins, United States Magistrate Judge. With respect to the five substantive counts charged in the Superseding Indictment [DE-44] under Title 18, United States Code, Sections 2314 and 2, the United States will seek to prove at trial of this cause, solely with respect to the defendant Jennifer L.

Gruenstrass, that the victim as to each of Counts 2 through 6 was Ethicon, Inc.

Respectfully submitted,

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

By: s/ Thomas A. Watts-FitzGerald

Assistant U. S. Attorney
Florida Bar No. 0273538
99 Northeast 4th Street
Miami, Florida 33132-2111
Tel: (305) 961-9413
Fax: (305) 536-4651

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 07-80021-CR-MARRA

UNITED STATES OF AMERICA,	)	
GOVERNMENT,	)	
-v-	)	
KERRI KALEY AND BRIAN KALEY,	)	
DEFENDANTS.	)	West Palm Beach, Florida May 12, 2010

TRANSCRIPT OF STATUS CONFERENCE

BEFORE THE HONORABLE KENNETH A. MARRA

UNITED STATES DISTRICT JUDGE

Appearances:

FOR THE GOVERNMENT
Thomas A. Watts-Fitzgerald, AUSA,
Alison W, Lehr, AUSA
United States Attorney's Office
99 Northeast 4the [sic] Street
Miami, FL 33132

* * *

FOR DEFENDANT KERRI KALEY
Howard M. Srebnick, ESQ.,
Richard Strafer, ESQ., and
Black, Srebnick, Kornspan & Stumpf
201 South Biscayne Boulevard
Suite 1300
Miami, FL 33131

FOR DEFENDANT BRIAN KALEY
Susan W. Van Dusen, ESQ.
2701 South Bayshore Drive
Suite 315
Miami, FL 33133

[3] (Call to the order of the Court.)

THE COURT: Good morning, please be seated.

All right. We're here in the case of the United States of America versus Kerri Kaley and Brian Kaley, case number 07-80021-CR-MARRA.

May I have counsel state their appearances, please.

MR. WATTS-FITZGERALD: Good morning, Your Honor. Tom Watts-Fitzgerald and Alison Lehr, on behalf of the United States.

MR. SREBNICK: Good morning, Judge. Howard Srebnick. I have a temporary appearance on behalf of Kerri Kaley. With me is Richard Strafer, who's been assisting with the proceedings up to now.

MS. VAN DUSEN: Good morning, Your Honor, Susan Van Dusen, and I likewise have a temporary appearance on behalf of Brian Kaley.

THE COURT: Good morning.

MS. VAN DUSEN: Good morning.

THE COURT: All right. This has been scheduled as a status conference, I guess, in anticipation of

the hearing that we have scheduled later this month on the seizure issue or the question of whether the Kaleys' assets should be released from the protective order.

So who wants to speak first?

MR. SREBNICK: Judge, I'd be happy to just lay out [4] for the Court the reason we asked for the status conference is just to reacquaint ourselves with the case. It's been some time, and to let you know what we were planning to do between now and May 27 so that you'd have a better idea.

We're now going back through the record, including the trial that the Court heard for the codefendant, Gruenstrass, and it is our – it's going to be our position that we would like to present for the Court's consideration the record from the Gruenstrass trial as the record of the evidentiary hearing that is scheduled for May 27. That would be the starting point. And since that's already a matter that's been docketed, it's in the record, it's in this case, we wanted to give you the heads up so that the Court would be acquainted with it in time for May 27.

And what we would plan to do then is submit a pleading within the next week or so identifying what we believe are the key portions of that trial so that the Court knows where we are headed in terms of the presentation we intend to make on May 27. So then the first thing we would be doing is offering as our offer of proof the trial testimony from the Gruenstrass trial, at which the Government, of

course, represented by the same lawyers, had the opportunity to examine witnesses. We would also like to cite for the Court several cases that we will be presenting in more detail in our memo regarding the theory that the Government adopted [5] at the Gruenstrass trial, this theory of a – essentially a constructive trust that Kerri Kaley and other sales representatives acquired these devices as agents for Ethicon, and therefore the stealing of that property was a stealing from Ethicon.

And we'd like the Court to take a look at the following three cases which will be in the memo we will submit next week. One of them is United States versus Goodrich, 871 F.2d 1011, Eleventh Circuit, 1989; United States versus Holzer, H-o-l-z-e-r, 816 F.2d 304, that's a Seventh Circuit case from 1987; and United States versus Miller, 997 F.2d 1010, a Second Circuit case from 1993.

Those cases we believe are relevant to the consideration of the Government's theory that Kerri Kaley and the other sales representatives acquired the devices as essentially trustees for Ethicon, the employer. We believe those cases reject that theory, and so we'd like the Court to consider it, give the Government an opportunity to look at those cases, and we'll brief it in more detail over the next week.

We would also ask that the Court allow us, and if not us then in camera review, the affidavit of the agent that was submitted to Your Honor years ago which was part of the basis that the Government

relied upon for the continued restraint, to determine whether the Government's theory that it adopted [6] before Your Honor in that affidavit and for that matter before the grand jury that indicted the Kaleys, is the same or different than the new theory that we believe the Government is proceeding under, this theory that the property was Ethicon's property and was stolen from Ethicon, because we understood at least early on in the case that the Government's theory was that the property was stolen from the hospitals. That was the theory that we understood we were going to be defending against. But it appears now, after the Gruenstrass trial, that the Government shifted its theory and is proceeding under a new theory that the Defendants stole property from its employer, Ethicon.

And so we would ask the Court either to allow us to review or for the Court to then review in camera both the affidavit of the agent and the grand jury testimony that the Government could submit to Your Honor for in camera review to determine whether the Government has changed its theory and indeed changed its theory for restraining the asset. Because if the grand jury found, based on the Government's presentation, that the property that was allegedly stolen was stolen from the hospitals, and the Government has since abandoned that theory, as it apparently did during the trial in its closing argument – I read that the prosecutor told the jury that the Government is not claiming the property was stolen from the hospitals, but rather that the Kaleys and [7]

others acquired this property as essentially trustees for Ethicon, the employer, and that the property was thereafter stolen from the employer – if the theory has changed, that may constitute a constructive amendment of the indictment, and if nothing else, it's not the theory that the grand jury indicted on and that the restraining order was based upon.

And so we're identifying that for Your Honor as another issue that we think is relevant to your determination on May 27 of whether the Government can continue to restrain these assets necessary for the Kaleys to retain counsel of choice.

We may have other documents that we would present at the hearing, but we're giving you the heads up now that it's our current thinking that with the transcripts from the Gruenstrass trial, that, plus a few additional documents which we will preview for the Government and hope to obtain stipulations of authenticity so we don't have to fly in witnesses, it may well be, Judge, that the hearing on May 27 will be little more than just a few additional documents and the Court's consideration of the testimony you've already heard from the Gruenstrass trial, and then it would be a legal debate over what to do about all that evidence and what findings the Court should make at that time.

And if I could just consult with my colleagues, that may be all we wanted to preview for the Court at this time.

[8] (Brief pause in proceedings.)

MR. SREBNICK: Ms. Van Dusen suggests, I think it's a good idea, we're previewing our approach, and since this is not a trial, it's an evidentiary hearing, it's been my experience that the Court is typically not demanding of the parties to present live testimony if there is – in lieu of live testimony, we would rely upon the transcripts of the trial. But if it's the Court's preference that we bring the witnesses and replay the very trial that the Court already heard, certainly we could do that via subpoena. But we thought that given the Government's participation in that proceeding, the opportunity the Government had to cross-examine witnesses, we assumed that that would be a sufficient record for the Court to make its findings. So that's why we've previewed it, but, of course, if the Court would prefer, if the Government objects, then certainly we could subpoena the witnesses and replay the Gruenstrass trial before Your Honor.

THE COURT: I guess it's kind of hard to know in advance until you tell me and the Government what witnesses and what testimony you're actually going to be looking to and relying upon for me to make the determination. I presume you're not asking me to consider everything, and it sounds like you probably want me to rely more on the Defense witnesses than the Government's witnesses.

[9] MR. SREBNICK: Actually, it's both. Based on my limited review, I'm going back through it now, there were certainly some Defense witnesses that told about the consent that was given to the

sales reps to take the merchandise, et cetera. But even some of the Government witnesses, the alleged coconspirators who stated that from their perspective they hadn't stolen anything, that they didn't view the property as being owned by anybody else after the hospitals had abandoned it. But we will focus the Court and the Government in on those portions of the record that we think are most relevant. So perhaps what we could do, if we file – if today is the 12th, is it?

THE COURT: Yes.

MR. SREBNICK: We think that within seven days from today, by next Wednesday close of business we can submit to you a memorandum that will identify what we think are the important parts of the trial testimony that we would be relying upon, give the Government an opportunity to respond as to whether they would require that we bring in those witnesses and have them here live for further examination by the Government. Of course, they've already been examined.

But that's how we propose to proceed to make it efficient and get a ruling from the Court on that basis. And to the extent there's been any change in circumstances in terms of the Kaleys' finances, we would also present that on [10] the 27th, though I don't think anything has changed to improve their financial situation, so that that I think is pretty much the same as before or worse actually in terms of finances.

THE COURT: So you really, if you had your way, you wouldn't be presenting any live testimony other than maybe someone from the Kaleys on the issue of what their current finances may be?

MR. SREBNICK: We are prepared to present live testimony, we just think that it's not necessary, but we'll do it at the Court's pleasure.

THE COURT: I understand. I'm just saying if you were going to be able to design the hearing the way you wanted, you wouldn't be presenting any additional live testimony?

MR. SREBNICK: Right. We don't think it's necessary for the Court to rule in our favor on the issues we think are relevant at this point. We think the record has made the point with the additional material that we submit.

THE COURT: And that's going to be documentary information which you hope to get stipulated as to authenticity?

MR. SREBNICK: Exactly, Judge.

THE COURT: So assuming that's the way it turns out, we're basically just going to need to have some argument about how I should view the evidence and what conclusion I should [11] make, and it's basically just going to be more of an argument than an evidentiary hearing?

MR. SREBNICK: I think so.

THE COURT: And how long do you think it would take to conduct the argument?

MR. SREBNICK: Couple hours between both sides, and I think we can do it, if we're starting at 10:00, we would be done by lunchtime I would think.

THE COURT: All right. Because the reason I'm asking is I'm going to be in the middle of a very lengthy trial, and I would prefer to have that day for completing my trial rather than – if we're not going to need the whole day for this, which is what I understood from the beginning, we're going to need a full day from this.

MR. SREBNICK: We could do it any time that's convenient.

THE COURT: You think it would be two hours at the most?

MR. SREBNICK: I think that's a fair estimate.

Let me just conclude by indicating but for the fact you had presided over the Gruenstrass trial, we would have been having to present all of this anew. But since you've already heard it, and if you all agree that that record is the record that the Defense would make for purposes of this hearing on the 27th, and we can all agree to rely upon it and [12] you rule from it, I think we've saved a lot of time.

THE COURT: All right. Thank you.

Mr. Watts-Fitzgerald, good morning.

MR. WATTS-FITZGERALD: Good morning, Your Honor.

Your Honor, the Government, of course, just from the purely procedural point of view, won't reasonably withhold stipulations and accommodations to the extent possible and appropriate, but I'm having a little trouble following what some of what counsel is pitching to the Court when I compare it to what the Eleventh Circuit said and this court said in its order.

We're not here at the hearing we're going to have to challenge the Government's theory of the case. In fact, the Eleventh Circuit, in the majority decision and the opinion of Judge Tjoflat, uniformly said this is not a preview of the Government's trial, it's not a preview of the Government's underlying case evidence.

The Defense can say, well, that happened in the Gruenstrass case, but that was not the Kaley trial. The evidence with respect to the Kaleys is going to be substantially different. There is some evidence with respect to their conduct that was adduced during the Gruenstrass trial, of course. Some of the witnesses will undoubtedly reappear. They will testify about the sources of various medical devices. But to say that because one witness [13] characterized what they did with respect to the material they transmitted to the

Kaleys carries over to every potential witness is absurd.

The issue here is not who was the victim of the theft.

THE COURT: Can I interrupt you for a second? Okay. They've got the burden, correct?

MR. WATTS-FITZGERALD: Absolutely, Your Honor.

THE COURT: And you agree that you've got the burden on getting the protective order lifted, correct?

MR. SREBNICK: We agree that the Court has held that. We disagree with the ruling, but we understand that that's the burden that's been imposed upon us over our objection.

THE COURT: Okay. Didn't the Eleventh Circuit say you have the burden?

MR. SREBNICK: Yes.

THE COURT: So the Eleventh Circuit said that.

MR. SREBNICK: Yes.

THE COURT: You agree with the Eleventh Circuit?

MR. SREBNICK: We agree that's what the Eleventh Circuit said. We agree the Supreme Court in the Mitchell case said differently.

THE COURT: As long as everyone agrees that's what the Eleventh Circuit said.

MR. SREBNICK: Yes.

[14] THE COURT: So they have the burden.

MR. WATTS-FITZGERALD: Absolutely, Your Honor. Now – I'm sorry.

THE COURT: So it's their burden. This is how they want to proceed. So why not let – if you think what they're going to do and submit is going to be inadequate to meet their burden, okay, you can argue that after they've submitted their evidence and they've rested and they make their argument, and you can get up here and say they're wrong and I shouldn't, you know, rely on this testimony, and for everything you're telling me now you can tell me then. I mean, why not let them present their evidence and let them present their – make their record, and if that's how they want to proceed and you think it's inadequate, then you're sitting pretty. Why are we going to argue that now?

MR. WATTS-FITZGERALD: Only because it appears from what they're saying they really don't intend to focus on the issue the appellate court said they must focus on, probable cause for the Government to make the seizure.

THE COURT: Okay. So if you're right –

MR. WATTS-FITZGERALD: If they won't do that, Your Honor, you don't even need to hold a hearing.

They say in the appellate – they filed a petition for rehearing en banc, and they clearly say on page 20 and 21, we've already had the hearing we're entitled to, it's been [15] done. What's the point? Well, they found a new point because what they really want to do is mislead the Court and get you to focus on something extraneous. I don't expect the Court to do that. They're going to lose, we're going to go to trial. I just want to get this case to trial. These people have been hanging out there with this uncertainty. We're sitting on the money that should be forfeited and provided back to the victim. We'll get her done.

So I don't foresee a full day of hearing. I don't see the Government putting on a lot of witnesses. I'm happy to hear that we're going to get an explication of what they're relying on. I'm familiar with one of the three cases that they – the Eleventh Circuit case that they're relying on, and we'll go forward. But, you know, they've already told the Court, and I have to believe when all these esteemed counsel sign a formal pleading to the Eleventh Circuit that they meant it when they said they've already had their hearing.

THE COURT: All right. So it sounds like you're asking me to rule now that they lose, and it seems that the Eleventh Circuit said I should do something else, and I concluded based on what the Eleventh Circuit's ruling that I need to have a hearing,

an evidentiary hearing. That's the result of the appeal. The appeal, the appellate court said I had to reweigh the factors; I've done that. After reweighing the factors, I've concluded that I need to have an evidentiary [16] hearing, allow them to have an evidentiary hearing. I think I need to give them the opportunity to present whatever they want at an evidentiary hearing, and once it's presented, then I'll decide whether they've met their burden or not.

But for me now to say, well, you're wrong, you can't do this, and it's worthless and meaningless and you're wasting my time, I think it's premature, and which that's what it sounds like you're asking me to do, and I think I need to wait and give them the opportunity to present whatever they want, you can present whatever you think you need to in response, and then I'll make my decision.

So if that's how they wanted to proceed – and I understand you think if they proceed that way they lose, sounds like you should be happy about that. Rather than criticizing it, you should say, that's the way you want to proceed? Fine. Okay. Let's go that route, and I'll just wait until you're finished and convince you that they lose.

MR. WATTS-FITZGERALD: Your Honor, I simply wanted to put a point on the focus of the hearing so we're not wasting everybody's time. And I would hate to see an ineffective assistance of counsel claim arise later because the focus was inappropriate

or didn't match the Court's decisions. And I say that a little bit tongue and cheek, of course.

The focus is supposed to be the probable cause of the detention, not the underlying indictment, not what the [17] Government's proof may be at trial in this case, not what the Government's theory of prosecution is even.

Thank you.

THE COURT: All right. So assuming that's how they're going to proceed, it doesn't sound like they're going to need much time in terms of presenting anything other than arguing based on what's submitted. Do you foresee at this point presenting any additional evidence in addition to what's already in front of me?

MR. WATTS-FITZGERALD: Your Honor, I would say no, and it would be my heartfelt intent not to. I can probably give the Court a better sense of that after I see their pleading a week hence. Then I'll see where they're going and what they're relying on. And then if they contact me during that interim to talk about who the witnesses or documents they're asking for stips and agreement on, I'll know if I need to put a witness on or now, and I can certainly communicate that to chambers if you like and to counsel. But as of right now, what I'm hearing, the chances are no, we would not. We would strictly be coming up to have a different version of this argument.

THE COURT: Okay. So let's assume that we're not going to need any additional testimony, we're just going to – it's going to be argument based on what's submitted to me either through the transcripts or the affidavits and [18] additional documents that's presented, and let's assume it's going to take two hours to argue it. It sounds like that's probably on the long side. I'm not sure we're going to need two hours to argue this issue, but let's assume we're going to take two hours.

Can we, if that's going to be the case, assume that we'll do this like at 3:00 o'clock rather than 10:00 o'clock –

MR. SREBNICK: That's fine.

MS. VAN DUSEN: Yes.

THE COURT: – in the afternoon, so I can have the whole day from 9:00 to 3:00 to do my trial, and if it turns out after – we'll leave that day open right now. I'm not going to make any changes, because if, after seeing the Defense's submission, the Government thinks they have to bring in a bunch of witnesses, we may need more than two hours. But on the assumption that we are not going to need a full day, why don't you plan on being here at 3:00 rather than 10:00, and if that needs to change we'll change accordingly after we hear from the Government.

Is that all right?

MR. SREBNICK: Very good, Judge.

MR. WATTS-FITZGERALD: Fine, Your Honor.

MS. VAN DUSEN: Thank you, Your Honor.

THE COURT: Anything else?

[19] MR. SREBNICK: That's it.

MR. WATTS-FITZGERALD: That's it, Your Honor.

THE COURT: Okay. We'll see you, then, on the 27th at some point during the day. Have a good day, and thanks for coming up.

(Proceedings concluded.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 07-80021-CR-MARRA

UNITED STATES
OF AMERICA,

Plaintiff,

v.

KERRI L. KALEY, *et al.*,

Defendants.
_____/

DECLARATION OF ETHICON ENDO-SURGERY, INC.'S RECORDS COORDINATOR

(Filed Jul. 28, 2010)

I, Rebecca Musselman, declare and state as follows:

1. I am a Records Coordinator for Ethicon Endo-Surgery, Inc. ("EES") at 4545 Creek Road, Cincinnati, Ohio 45242. EES develops, manufactures, and markets advanced, innovative medical devices for minimally invasive and open surgical procedures. I am authorized to certify the completeness and the authenticity of the records produced by EES.

2. I make this Declaration in response to a subpoena dated May 18, 2010, issued by Defendants' counsel, Howard M. Srebnick (Fla. Bar No. 919063), of Black, Srebnick, Kornspan & Stumpf, P.A., 201

South Biscayne Boulevard, Suite 1300, Miami, Florida 33131, and served on the "Records Custodian Endo-Surgery, Inc." *(sic)* at 4545 Creek Road, Cincinnati, Ohio 45242 ("Subpoena"). A copy of the Subpoena is attached at Tab 1.

3. Upon information and belief, EES filed a Motion to Quash the Subpoena on May 25, 2010 (D.E. 200), resulting in a hearing before Judge Kenneth A. Marra on May 26, 2010. The scope of the records requested in the Subpoena was subsequently modified and narrowed by the Court and by the agreement of counsel for Defendants and EES as follows:

(a) Any practice or procedures manuals or training documents that set forth EES's policies and procedures and directions to sales representatives from 1999 to the present relating to the handling of the EES products in question;

(b) Documents reflecting the filing of lawsuits (i.e., copies of the Complaints) by EES against sales representatives or former sales representatives from the State of New York during the relevant time period of 1999 to the present, asserting claims of fraud, breach of fiduciary duty, misappropriation and/or conversion based on any allegedly unauthorized or improper sales of products previously sold by EES to hospitals (mostly through distributors), including but not limited to such lawsuits in which EES seeks not only damages but also the imposition of constructive trusts over the proceeds of the sales;

(c) Documents reflecting that demand letters were sent by EES to the sales representatives or former sales representatives from the State of New York or their lawyers, threatening to sue such sales representatives for damages under the same tort theories and/or to impose constructive trusts for the conduct described in Paragraph 3(b) above;

(d) Documents reflecting that EES ever sought restitution from any of the defendants in the various criminal cases against former sales representatives from the State of New York filed in the Southern District of Florida since this investigation began in 2005 to the present; and

(e) Copies of any communications or correspondence between EES and (1) the U.S. Attorney's Office for the Southern District of Florida and/or (2) the Probation Office in the Southern District of Florida, concerning restitution or making such claims as a victim of the charges in any of the aforementioned cases. Included within this request for documents were notices that Probation (and or the Victim/Witness section of the U.S. Attorney's Office) is required to send to potential victims under 18 U.S.C. §3664(d)(2) and any responses by EES.

4. A complete search involving personnel from a number of departments was conducted to identify, collect, and produce all currently available documents responsive to the Subpoena, as outlined in Paragraph 3 above.

5. EES has no documents responsive to the requests outlined in Paragraphs 3(b) – (e) above.

6. Documents responsive to the request outlined in Paragraph 3(a) above are attached at Tab 2 (EES0001 to EES0200). The copies of the records provided in response to the Subpoena as outlined in Paragraph 3(a) above are true and complete reproductions of the original records, which were prepared by personnel employed by EES, in the ordinary course of business, at or near the time of the acts, conditions or events recorded, and are kept in the course of regularly conducted activity.

7. Also, the documents comprising Composite Exhibit 4 to Defendants' Hearing Memorandum filed May 20, 2010 (D.E. 196), which are attached hereto at Tab 3, and Sections 1.1 and 1.2 of the EES Field Sales Associate Policy & Procedure Manual dated 6/01, which are attached hereto at Tab 4, are true and complete reproductions of the original records, which were prepared by personnel employed by EES, in the ordinary course of business, at or near the time of the acts, conditions or events recorded, and are kept in the course of regularly conducted activity.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 27th day of July 2010 at Ethicon Endo-Surgery, Inc., Blue Ash, Ohio.

/s/ Rebecca Musselman
Signature

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 07-80021-CR-MARRA

UNITED STATES OF AMERICA,	)	
GOVERNMENT,	)	
-v-	)	
KERRI KALEY AND BRIAN KALEY,	)	
DEFENDANTS.	)	West Palm Beach, Florida
	)	July 29, 2010

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE KENNETH A. MARRA
UNITED STATES DISTRICT JUDGE

Appearances:

FOR THE GOVERNMENT
Thomas A. Watts-Fitzgerald, AUSA,
Alison W. Lehr, AUSA
United States Attorney's Office
99 Northeast 4the [sic] Street
Miami, FL 33132

* * *

FOR DEFENDANT KERRI KALEY
Howard M. Srebnick, ESQ.,
Richard Strafer, ESQ., and
Black, Srebnick, Kornspan & Stumpf
201 South Biscayne Boulevard
Suite 1300
Miami, FL 33131

FOR DEFENDANT BRIAN KALEY
Susan W. Van Dusen, ESQ.
2701 South Bayshore Drive
Suite 315
Miami, FL 33133

[3] (Call to the order of the Court.)

THE COURT: Good afternoon, everyone. Please be seated.

Okay. We are here in the case of United States of America versus Kerri Kaley and Brian Kaley, Case Number 07-80021-CR-MARRA.

May I have counsel state their appearances, please.

MR. WATTS-FITZGERALD: Good afternoon, Your Honor, Tom Watts-Fitzgerald.

MS. LEHR: Alison Lehr, on behalf of the United States. Good afternoon.

THE COURT: Good afternoon.

MR. SREBNICK: Good afternoon, Judge. Howard Srebnick, Richard Strafer, Susan Van Dusen, temporary appearance on behalf of the Kaleys, both here in court. Also with the Court here today is our legal intern, Franchesca Rufine (phonetic), who's an intern from the Columbia University, thinking about going into the law.

THE COURT: Good afternoon, everyone.

We're here on the evidentiary hearing regarding the – whether or not the pretrial restraint of the Kaleys' property should remain in effect during – until the conclusion of the trial. So I guess the Defendants want to go first, since I understand you don't agree with the Eleventh Circuit's position on who has the burden here, but as you [4] outline in your brief, I need to follow that ruling until otherwise instructed by superior authorities.

MR. SREBNICK: I understand.

May it please the Court.

The evidentiary hearing that we're having today I believe is concluded in terms of the presentation of the evidence the Defense had presented to the Court via the transcripts of the hearings – excuse me, the trials, the trial of Ms. Gruenstrass, in addition to some matters that were provided by Ethicon via subpoena, which have been filed with the clerk. So everything that we intended to rely upon at today's evidentiary hearing is now a matter of record. I believe that the Government doesn't have any additional evidence to present. I think that's what Mr. Watts-Fitzgerald was just whispering to me, but perhaps we should confirm that before we go much further.

THE COURT: All right. Well, before I hear from the Government, can you just outline just so I'm clear exactly what it is, other than the trial transcripts from the Gruenstrass trial –

MR. SREBNICK: Yes.

THE COURT: – that you think makes up the evidentiary record?

MR. SREBNICK: Yes.

And I think yesterday we finally received from [5] Ethicon the materials we had asked by subpoena. So we did file them, copies given to the Government. And there is what should be in the docket the corrected notice of filing hearing exhibits, and it lists for Your Honor what is – should now be in the record.

First is the declaration of the records custodian of Ethicon. The declaration is dated July 27, 2010, with attachments to it, including the subpoena, some policy manuals, product brochures, things of that nature.

In addition, we are relying upon the bill of particulars that was filed in the Gruenstrass case, which we believe is our case. That is a matter of record, and Your Honor would have seen that some time ago.

We are relying upon the excerpts from the trial of Ms. Gruenstrass.

We are relying upon the transcript of the sentencing of Frank Tarsia, T-a-r-s-i-a, who was sentenced by Judge Ryskamp.

And if I could just have one more moment?

There's also a transcript, Docket Entry 159 – excuse me one moment. If I could just have a moment. I misread something.

So that is it, Judge, in terms of what our evidentiary presentation is for purposes of this hearing. There were other matters that we had submitted to Your Honor [6] probably years ago with regard to pleas and sentencings of other related Defendants, alleged coconspirators, a Mr. Schmidt (phonetic), but basically everything that has been part of the record that we intend to rely upon has been docketed, so it's available and the parties have seen it.

So that would conclude our evidentiary presentation.

THE COURT: All right. Thank you.

Is the Government going to have any evidence in rebuttal or response?

MR. WATTS-FITZGERALD: Your Honor, there was an error noted in the documents submitted by Ethicon. It does not appear in the Bates range as an omission but was noticed in our review of those records. There is an employee secrecy noncompetition nonsolicitation agreement executed by the Defendant, Kerri Kaley, that appears in the Defense exhibit enclosed as exhibit A or Docket Entry 220-1. The Bates number of the two pages that were submitted are Echo Echo Sierra, EES00199 and 200, the two sequential pages. But when you examine them, you realize it's missing an intermediate page.

We raised that issue with Ethicon this morning, and they were able to determine that was simply a Xeroxing error, and they provided to us and as well to the Defense I understand now, document EES00201, which would complete that document, and we would submit that it ought to be put in for purposes of the Court's record. It actually has the [7] provisions about not self-dealing and selling things contrary to the company's interest, et cetera, for whatever relevance that may have. It completes the Defense document.

THE COURT: Any objection?

MR. SREBNICK: Of course not.

THE COURT: That will be made part of the record, as well.

MR. WATTS-FITZGERALD: May I approach, Your Honor?

THE COURT: Yes.

Any other evidentiary material from the Government?

MR. WATTS-FITZGERALD: Your Honor, we believe that all the other materials that the Court might have are already a matter of record in the underlying case, which includes the entire trial transcript in the Gruenstrass matter, to the extent that parts of that may be relevant. We may allude to some. The Defense on various occasions have filed extracts or copies of some of those. I think the balance of this is simply an argument on the law.

THE COURT: Okay. Very well.

MR. WATTS-FITZGERALD: I would renew, Your Honor, since we're going to that, that I noted that their belated pleading this morning claims that you need to scope out or we need to decide in some fashion the scope of this proceeding. We believe that the Court's done that in its order and in its prior direction, but essentially in our view there's only one [8] thing at issue now, and that is their burden to challenge the forfeitability.

THE COURT: All right. I didn't see anything filed this morning, so maybe I – maybe I missed it.

MR. SREBNICK: In the last several days we've been organizing our thoughts. We prepared a written summary of our thoughts which we're going to discuss today, but we filed it, sort of like what the president does before he delivers his State of the Union. So we've delivered our state of the union, Your Honor, in writing this morning.

THE COURT: I did not see that.

Is it materially different from your hearing memorandum that was filed a few months ago?

MR. SREBNICK: It does make reference to the new documents we just received, so there is some reference to that. There is one – one thought that we convey in it that I'm going to convey to Your Honor today in terms of what is the burden that we believe the Government should have to sustain before Your

Honor in order to continue the restraint the [sic] assets. The Court having already ruled that we're entitled to a hearing, we believe that the burden should be on the Government – and we know the Eleventh Circuit has already said otherwise – and we believe that that burden should be consistent with what the statute, 21 U.S.C. 853, imposes on the Government if this had been a preindictment seizure or [9] restraint. And that is, the Government should have to convince that there is a substantial probability that the Government will succeed in forfeiting this asset, that it's not simply enough to establish mere probable cause, but that the Government has to show a substantial probability of success.

In order to obtain forfeiture, of course, the Government would need to obtain a conviction of the Defendants first and then a forfeiture verdict from that jury. And so the conclusion that we draw from that standard is that the Government must convince you that there is a substantial probability that the Defendants would be convicted, which would then allow the forfeiture of the asset. So that is laid out in the memorandum.

But the first issue that I think the Court needs to decide is what is the scope of the hearing that the Eleventh Circuit has set forth for today's hearing. The Government's position is that the only matter Your Honor is here to address today, as I understand it – and the Government of course will correct me if I've misinterpreted their position. We understand the Government to say that Judge Marcus' opinion only

allows us to challenge whether the assets restrained, the certificate of deposit, the house, was involved in or traceable to the conduct alleged in the indictment. In other words, I believe the Government's position is that we must [10] assume for purposes of this hearing that the medical devices that were allegedly stored in the home of the Kaleys that were allegedly sold by the Kaleys to a distributor here in Delray, we must assume for purposes of this discussion that there exists probable cause to believe that that constituted the crime of interstate transportation of stolen devices, and that the only thing we can challenge today, now that you've given us this hearing, is whether that conduct, assuming it's criminal, is connected to the asset that the Government seeks to restrain.

If that is the standard Your Honor believes applies today, and that's all we're here to decide if that's what Your Honor finds that that's all Judge Marcus' opinion authorizes us to do today, well, then we have nothing to respond in that regard, because we have no evidence to contest today for purposes of this hearing today. We are not contesting that the assets restrained were involved in and traceable to the conduct. Our quarrel is whether that conduct constitutes a crime. And so if that's how the Court interprets Judge Marcus' opinion, we have very little to do today other than to have Your Honor enter its order and for us to then pursue an appeal that the Eleventh Circuit appears to say we're entitled to pursue, since it would be the continuation of the restraining order.

THE COURT: All right. Well, let's assume that I'm [11] going to agree with you, since if I agree with the Government we don't need to go any further. So let's hear out your version of how these things should shake out.

MR. SREBNICK: Very well.

From our view, due process requires more than simply an analysis of traceability. Due process requires that we be given an opportunity to challenge whether the asset restrained is subject to forfeiture, and in our view that means challenge whether the Government will prevail at trial in trying to obtain forfeiture. To prevail at trial, the Government must prove the Defendants guilty. Only then can the Government obtain forfeiture.

THE COURT: So then why – aren't we effectively having two trials? We're going to have a trial on the restraint, the Government's going to have to convince me, as opposed to a jury, that there's a substantial likelihood as opposed to beyond a reasonable doubt. I'm assuming you're agreeing they don't have to prove beyond a reasonable doubt to me that the Defendants are going to be convicted, but there's a substantial likelihood that they will be convicted, similar to a preliminary injunction standard.

MR. SREBNICK: Exactly what we think.

THE COURT: All right. And so we're going to have a trial on that. And then if I – whether or not

I agree, then there will be a trial on the merits of the criminal trial?

[12] MR. SREBNICK: Exactly what we think should happen, that because the Government is seeking an interim restraint on assets without conviction, without title to the property, the Government wants you to hold those assets away from the titleholder, just like in a civil case when the party comes to Your Honor seeking a TRO or preliminary injunction to hold that asset until the merits of the case are resolved, civil defendants are entitled to due process before the trial, we believe criminal defendants should be treated at least as well, and perhaps better, given the interests at stake, the right to counsel of choice.

THE COURT: And what about the language in the – I forget the decision, the controlling decision that I applied, and the Eleventh Circuit corrected me in terms of how I applied it, that says you don't get to the merits of whether or not there's a – a crime's been charged?

MR. SREBNICK: The way I understand the Eleventh Circuit – and I can see how people might differ. The Government understands that to mean we don't look into the guilt or innocence of the Defendant. That's their position. If the Court agrees, we can stop now. I view that to mean that the Court is not going to render final judgment, is not going to reach the merits and enter a judgment in favor of the Defense or the Government, it's simply going to

decide the merits of the protective order, not the merits of the judgment [13] that the Government is seeking at the end of this case.

So if you agree with us, for example, that the Government doesn't have the ability to establish today a likelihood of success, the remedy you can provide us today is limited. It's simply to dissolve the restraining order. Your Honor doesn't have the authority to impose judgment in favor of the Defendants today, i.e. entering a judgment of acquittal. And so Your Honor's not going to reach the merits of the case, so to speak. Your Honor's simply going to reach the propriety of the restraint.

And so the Government essentially gets two shots at this asset. First they can try to restrain it now, and if they simply decide not to show all their cards at this hearing, they only want to make a limited presentation, as they've done so far, the worst that can happen to the Government is that the asset is unrestrained, the order is dissolved and the Defendants can use their asset to retain counsel. That doesn't prevent the Government at the trial on the merits from presenting more evidence and trying to shore up their case to obtain a conviction at that time.

THE COURT: I should have brought the – a copy of the Bissell opinion in, but didn't the court in Bissell say that the Government's not required to show its hand and present all its evidence, and that's not what this is all about? And so how do they meet

the burden without doing what [14] the Court said they don't have to do?

MR. SREBNICK: Precisely as Your Honor said. The Government doesn't have to prove beyond a reasonable doubt now in order to continue the restraint, they merely need to show a likelihood of success, substantial probability of success.

The Government can choose how much to present. They don't have to throw in all of their chips at this juncture.

Now, I understand that Bissell is being read by the Government and the Kaley opinion of Judge Marcus also being read by the Government to say we can't – we, the Defense, can't challenge the criminality of the conduct, and that's why I said the hearing would be short if you agree.

And so that's where we stand. We believe due process requires more of this hearing than simply determining whether this asset is connected to this allegation. It requires the Government to convince you that the asset will be forfeited at the end of this case, some showing to satisfy you that this asset, the CD, which may be involved in the conduct, will be forfeited by the Court when the trial finally occurs. That's how we view it.

THE COURT: All right. So do you want to go into why –

MR. SREBNICK: As you wish.

THE COURT: – assuming I agree with you that the Government does have to show that, why you believe they [15] haven't shown it?

MR. SREBNICK: Sure.

THE COURT: I'm not sure you need to, because I've read your brief and we've had this discussion before about the theory, and the legal theory, and they changed their theory.

MR. SREBNICK: Yes.

There is one thing that I believe Your Honor didn't have the benefit of, particularly at the trial of Ms. Gruenstrass, with regard to the idea that these devices somehow became the property of Ethicon at the time the Defendants allegedly took custody of these devices from the hospitals. If we freeze time right at the moment where a sales representative takes custody of the product from the hospital, someone perhaps is entitled to be deemed the owner of that device at that moment in time. Is it the hospital? Is it Ethicon? Is it the sales rep?

At least at the Gruenstrass trial, the Government proceeded on the theory that it was Ethicon's property at that moment in time, and therefore the sales representative who then sells it and makes money off of it has essentially stolen the product from Ethicon. We understand that to have been the Government's position and the one presented to Your Honor at the Gruenstrass trial. We believe that theory doesn't hold water in the Eleventh Circuit,

because the law of property and the deprivation of property needed to satisfy the federal [16] statutes require more than this theory of agency that the Government was proceeding under. It requires actual ownership by Ethicon of the product in question.

The evidence that we've presented so far shows that Ethicon has never asserted any ownership interest in any of these devices, having known about this conduct for now six years since the indictment in this case, at least. To this day, Ethicon has never asserted any ownership interest in any of the products that the sales representatives –

THE COURT: Is that necessary?

MR. SREBNICK: It is.

THE COURT: Why?

MR. SREBNICK: For the following reason. Because the Government's theory is that the deprivation of property is the heartland of the stealing. That is what the Eleventh Circuit requires. Ethicon must be the owner of that property in order for there to state a claim.

THE COURT: Well, somebody other than the sales rep has to be the owner.

MR. SREBNICK: Yes. The Government – yes, exactly.

THE COURT: So I mean, I'm not sure it necessarily has to be Ethicon.

MR. SREBNICK: Well –

THE COURT: As long as it's not the sales reps' property and they're selling it and making money off of it [17] it's a theft, isn't it?

MR. SREBNICK: Only if the owner objects. See, if the hospital gives it to the sales rep and relinquishes ownership – and we know that the hospitals were the owners prior to giving it to the sales reps – the hospital is no longer asserting ownership, and they cannot accuse –

THE COURT: Then it's not the hospital's property.

MR. SREBNICK: Exactly.

The only other theory is that it's Ethicon's property. It's one or the other. There's no one else in the universe asserting an ownership interest in this property.

THE COURT: Or it's the sales reps' property.

MR. SREBNICK: Yes.

THE COURT: Unless it's the sales reps' property they can't sell it, correct?

MR. SREBNICK: I would phrase it differently. Unless the owner of the property is claiming a theft, it's not a theft.

THE COURT: You need a victim to complain?

MR. SREBNICK: You need a victim to assert an ownership interest, yes.

THE COURT: You have to have someone come up and say, that's my property, and I –

MR. SREBNICK: Yeah.

THE COURT: – and someone wrongfully took it? You [18] need an actual victim to say, it's mine?

MR. SREBNICK: Yes. A conversion is the actual taking without the consent of the owner. It's the Government's burden to prove it was done without the consent of the owner. So if no one's objecting to the sale, it was not done without the consent of the owner. That's the definition of a theft. If it's done with the consent of the owner it's not theft. And that's where I think there's the disconnect, at least between us and the Government. Someone needs to say, that's my property and I objected, that I did not give consent.

THE COURT: So in order to prove a bank robbery, you need to have the bank say, I didn't agree to the robber coming in with a gun and holding up my teller? If the bank owner doesn't say that the Government can't prosecute a bank robbery?

MR. SREBNICK: They can prosecute, but they won't win on the element – for example, if I put

a gun to the teller and say, give me the money in my bank account, and they give me the money that's in my bank account, it's not theft. It's my money. I may be guilty of other crimes, using a gun, et cetera, but it ain't the bank's money, it's mine.

THE COURT: Say, give me all the money you've got, and I don't have an account here by the way.

MR. SREBNICK: Fair enough. Someone better come and [19] testify, someone has to come and testify that the money was given to the teller, and it was not with the consent of the bank. Of course, that's why they – of course, there could be circumstantial evidence that it was done without consent.

THE COURT: That's my point.

MR. SREBNICK: Yeah.

THE COURT: So do you need the actual person to come in and say, I didn't give consent, or can you through circumstantial evidence, the fact that they went into a bank, they didn't have an account there, they used a gun, they took the money and ran, can a jury conclude that it was somebody else's property and they didn't have consent?

MR. SREBNICK: Certainly there can be circumstantial evidence of ownership. I have no doubt about that. But in this case there is no evidence of ownership by Ethicon. That's the point. Ethicon has not asserted ownership of the property. That would be

some evidence. They haven't asserted any ownership. They didn't pay for the product to the hospitals.

The only theory that the Government has proceeded on is some agency theory that Kerri Kaley or another sales rep, by taking custody of this from a hospital, who gives it to the sales rep with the hospital's consent, that that act somehow creates an ownership interest in Ethicon. Ethicon's not asserting the ownership interest, the Government is.

[20] THE COURT: All right. Well, let's talk about what I recall from the Gruenstrass trial as the strongest evidence that I remember for the Government's theory. Okay? And I don't remember the witness' name, but it was a woman who worked at the hospital. And she testified that she would ask Ms. Gruenstrass, hey, I got these sutures, I can't use them anymore, we don't use these sutures anymore, the doctors don't – they want this other brand, or style, whatever you call them. Do you have any of the ones we want? And they traded. They gave the ones they couldn't use anymore, which were still unopened, still in the wrapper, perfectly useable, had value. I'll give you these, and you give me some ones I can use. It was an exchange, a trade. She said they did that.

There were some, I think she said, that they didn't want, they didn't care about, they couldn't use and gave them, but there were others that there was an actual exchange, kind for kind.

MR. SREBNICK: Between hospitals?

THE COURT: No, between the hospital and the rep.

Now, when the – now, the hospital owned it, they bought it, they paid for it. It was on their shelves. They couldn't use it anymore. They decided to try and get something in exchange for what they had paid for and can't use anymore and traded it with the rep for something they could [21] use. They give it back to the rep.

Now, your theory is it's the rep's property? Because the rep sold it and the rep made money on it, and you agreed I thought that in order for the rep to be able to sell it, it has to be the rep's property. Is it the rep's property?

MR. SREBNICK: If the hospital, as owner, gives it to the rep and it's the hospital's property to give away?

THE COURT: In exchange for the rep giving them something they can use.

MR. SREBNICK: Okay.

THE COURT: Which is not the rep's property.

MR. SREBNICK: Okay.

THE COURT: The rep has sutures in the trunk, as I remember.

MR. SREBNICK: Perhaps from other hospitals that wanted the same thing?

THE COURT: I don't know. The rep's holding property. Arguably it's their employer's property.

MR. SREBNICK: My understanding of the evidence is different. My understanding is that many hospitals would do exactly what Your Honor's describing. So the reps would accumulate from many hospitals sutures from Hospital A, suture from Hospital B, trocars from Hospital C, and the representative would have basically an inventory in their trunk, in their garage, of materials that had been given to [22] the representatives by hospitals.

THE COURT: I don't recall that all of the stuff in the trunks were given by hospitals.

MR. SREBNICK: I don't recall any evidence that – at least I don't recall any evidence that Ms. Gruenstrass – that the items that Your Honor's describing that she gave to the hospital in exchange for the sutures, that that property belonged to Ethicon. I don't recall that in the trial.

THE COURT: All right. Well, let's assume it did. Let's assume it was given by Ethicon to the rep –

MR. SREBNICK: Okay.

THE COURT: – to service the client. That's why they're there, to make the hospitals happy, for the hospital to keep coming back and buying their product instead of some competitor's product. So, here, keep this in your car because you may need to

give it to the hospital to satisfy a hospital's need. It's given by Ethicon.

MR. SREBNICK: Okay.

THE COURT: And the rep takes Ethicon's property that's in the trunk to service the client and gives it to a hospital in exchange for property that the hospital doesn't need anymore. So the rep takes the property, gives Ethicon's property to the hospital in exchange for property the hospital doesn't want or need anymore. Then the rep takes it and apparently sells it.

[23] Under my hypothetical, which is the hospital – it's Ethicon's property that they give to the rep to service the client, and they take that property and give it to a hospital in exchange for what the hospital once owned and doesn't want anymore, when that rep gets that property, is it the rep's property or is it Ethicon's property?

MR. SREBNICK: Under your hypothetical I agree with you, because it could be cash. If Ethicon gives a sales rep a thousand dollars to go out and help hospitals, and with that thousand she buys these items, it's Ethicon's property, I agree.

THE COURT: Okay.

MR. SREBNICK: But I don't think that's what happened here.

THE COURT: All right. Well, do I know in the Kaleys' case? I know what happened in the Gruenstrass case.

MR. SREBNICK: Uh-huh.

THE COURT: But do I know in the Kaleys' case that the Government can't prove that exactly my hypothetical is what happened?

MR. SREBNICK: On this record that we have today that you're presiding over, on this record there's no evidence that that happened; that's correct. So you have no reason to believe the Government will succeed on that theory, since they've presented no evidence to that effect.

[24] THE COURT: So if you're correct on who has the burden and what has to be shown here, you're saying the Government hasn't given you anything to prove that actually happened in this case, so therefore they haven't met – they haven't done what they need to do?

MR. SREBNICK: Yes. Even if it's our burden, we still win, since there's nothing in the record to rebut our evidence.

THE COURT: And the fact that the grand jury found probable cause to believe some crime was committed, that's not enough to carry the burden?

MR. SREBNICK: Correct.

Today Your Honor's the one who's going to decide, not 23 people with no judge, no jury instructions, no

due process, no confrontation, no right to counsel. So I think that it's Your Honor's duty, not the 23 nameless grand jurors, to decide whether the Government has a substantial probability of success.

What I think the evidence does show on this record is that these sales reps were given these excess products with the consent of the hospitals, accumulated them, sometimes traded them, and then, as charged in the indictment, sold them for personal property. That's the Government's allegation. But under no circumstance has Ethicon been – has Ethicon asserted an ownership interest, nor is there any evidence that [25] some ownership interest would magically arise by virtue of a hospital's decision to give the product to the sales rep.

Under the Miller case, that's a Second Circuit case that deals with New York law, under the Godrich (phonetic) case, the Eleventh Circuit's case that deals with corruption, where politicians take bribes, and then they're being accused of basically fraud on the taxpayers for dishonest services, the Eleventh Circuit has already made clear that these statutes only address the deprivation of property rights.

Perhaps the Government could make an argument that Kerri Kaley and the rest of the sales reps violated some company policy. Perhaps the Government could claim they were disloyal, perhaps that's a claim. That's not a property right. The evidence that we've presented shows that these were at-will employees with no fiduciary obligation to Ethicon. The

manuals showed that Ethicon never wanted the property back, disavowed property rights by saying, discourage the return of this property, these devices to Ethicon.

Ethicon didn't want to pay for these objects. And so it would be awfully hypocritical for Ethicon to now say, we are the owners of this property because our at-will employees have took custody, and therefore we have become the owners for free.

THE COURT: Are you trying to say an at-will employee can take property that belonged to the employer?

[26] MR. SREBNICK: Of course not.

THE COURT: Okay. The fact that they're an at-will employee, if it was Ethicon's property, it doesn't matter that they're an at-will employee or have a contract, does it?

MR. SREBNICK: Of course not.

What I'm saying is the fact that they're an at-will employee shows there was no fiduciary obligation to Ethicon, so that when a sales representative takes custody of the product from a hospital with the consent of the hospital – I'm assuming that. If it's without the consent of the hospital they're thieves, we all agree.

THE COURT: I don't think there's any evidence that anyone took anything without the consent of the hospital, as far as I know.

MR. SREBNICK: Fair enough.

So if the hospital, who is the rightful owner of the property –

THE COURT: Was. The question is was the rightful owner. Because once they give it up they're not the owner anymore.

MR. SREBNICK: Now the question is who's is it.

THE COURT: That's correct.

MR. SREBNICK: That's where we're at, Judge.

And I'm saying an at-will employee who takes custody of a product from the rightful owner does not thereby have [27] some fiduciary obligation to give it to their employer. Doesn't exist.

THE COURT: Really?

MR. SREBNICK: Really.

THE COURT: Under the hypothetical I gave to you, you said you agreed with me.

MR. SREBNICK: Your hypothetical assumed that the sales rep paid for it with money from the company. I'm saying if the hospital gives it away, take it off my shelves, I don't want it anymore – if I tell the sanitation truck driver, take this bicycle, my kid's not using it anymore, he takes it for his kid, has

he stolen the property from Dade County, or Monroe County or Palm Beach County? Because he's an employee, he has to take that bicycle and give it back to the county that was given to him by one of the people that he services?

I don't think so. I don't think so.

There's no obligation for the sales representative, when they take custody with the consent of the actual owner, to then somehow give it to Ethicon, and that Ethicon has somehow become the owner. Ethicon didn't want to become the owner because they don't want to pay for it. They discourage. Hey, don't take the property. We don't want it. Indeed, I think Ethicon would say that these sales representatives were acting outside the scope of their employment. Ethicon didn't want the property.

[28] THE COURT: Of course. They made a sale and they want to – they don't want to redo the sale. Just like anyone, when you go buy a shirt in the store, they don't want the shirt back and they don't want to have to exchange one shirt for the other, they want you to keep the shirt.

MR. SREBNICK: Exactly.

THE COURT: But if you take the shirt back and you give it to the cashier, the cashier can't say, well, they brought it back, I guess I'm going to take it and sell it on eBay now.

MR. SREBNICK: If I buy a shirt from the store and I go to the salesman a week later and say, I

didn't like this shirt, here, keep it, and I don't ask for any of my money back, and the salesman takes it back, I had paid for it, I don't ask for a refund, I say, here, thank you for – I don't like this shirt, you can keep it, there's the hypothetical, right, Judge?

THE COURT: If they meet him on the street and they say, here, keep the shirt, it's a little different than if you're in the store and you bring it back and say, here, keep it.

MR. SREBNICK: But she wasn't in the store. She was at the hospital, according to the evidence. These people didn't return it to the Ethicon facility, they returned it, supposedly returned it, gave it to the sales rep at the [29] hospital.

THE COURT: That's where they work, at the hospital.

MR. SREBNICK: Exactly.

THE COURT: So she was where she performs her duties for Ethicon, right? In the hospital.

MR. SREBNICK: And like I say, if Ethicon wants to assert that that constitutes some sort of breach of company policy, it did not give rise to a property interest. I think, Judge, there's not more I can say to deal – to wrestle with you on this issue. I think you've got our point. Whether you agree with it or not, I think you've got our point.

THE COURT: Okay. Anything else that you wanted to argue?

MR. SREBNICK: One moment.

Mr. Strafer reminds me, and it's in our pleadings, what we've been discussing here, this debate about property rights is addressed in case, and I think Miller is the best case, and it deals with the issue of a constructive trust.

Because what we're really talking about here when we're talking about agency is a situation of constructive trust.

And I think Miller, if the Court reads one case on this issue, that's the case I would ask the Court to read. And you'll like it, because it's an attorney who was approached by a client regarding property that the client might be interested in buying, and the attorney goes out and buys the property for [30] himself under his own name. The client then claims that the attorney deprived the client of property by essentially taking advantage of the information that the client was going to go buy the property, and the attorney buys it for himself.

The Second Circuit said that is not a deprivation of property. Maybe there's a lawsuit against the attorney for breach of fiduciary duty, or trust or something, but it's not theft, it's not conversion, it's not a deprivation of property recognized by the federal statutes.

THE COURT: Because they didn't – the client didn't own anything at that time. He just had a

hope of acquiring an interest in property, and there was nothing tangible.

MR. SREBNICK: When the attorney bought the property in the attorney's own name – and I draw the analogy when the sales rep takes custody of that device, when the attorney takes custody of that piece of property, okay, the Court says that the client could sue, could seek a constructive trust as a remedy, an equitable remedy, and ask the Court to impose a constructive trust so that the client can thereby, at one point later pursuant to a court proceeding, become the owner of the property. But until that time, the client is not the owner of the property.

And here's the thought I had to sort of illustrate the importance of this and why there needs to be an assertion of ownership. Because in the example I give you with the [31] Miller case, the client may choose for personal reasons not to want to become the owner of the property at a future time. Ethicon may want not to become the owner of those devices and has to assert its desire to become the owner. The theory that they became owner instantaneously upon the acquisition by the sales rep in the Ethicon case or by the attorney in the Miller case is not what the law says. The law tells us that the client or Ethicon can try to have a constructive trust imposed, and if they prevail they become the owners. Until that time, though, they're not the owners of the property.

The client might not want to become the owner of the property in the Miller case if, for example, the

lawyer bought the property, and then it has environmental problems and liabilities associated with that piece of property. The client could say, Judge, I want to sue my lawyer, he violated the breach – or breached the duty he had to me and I want damages, but I don't want the property.

Same here. If Ethicon wants to claim some sort of breach, they can sue the sales representatives and claim some sort of breach, which they haven't done, by the way, in the six years that they've known about this case. And so I'd ask the Court to consider the Miller case really as our best lesson on why this is not a property interest that is being supposedly converted by the Defendants.

Thank you, Judge.

[32] THE COURT: Thank you.

The reporter needs a break. Okay? So if we can take five minutes. All right? Thank you.

(A recess was taken from 2:13 p.m. to 2:23 p.m.)

THE COURT: Please be seated, everyone.

Back on the record. Both Defendants are present with their temporary counsel.

MR. WATTS-FITZGERALD: Temporary for all these years just seems a misnomer, Your Honor.

May it please the Court.

Your Honor, you put your finger on this when you asked my learned opponent how does the Government, under Bissell and under Eleventh Circuit Kaley, do what they demand without explication of its evidence in the case? And I submit to the Court it simply can't be done. Whatever the standard they would like the Government to meet in demonstrating the propriety of the restraint, if it goes to evidence, whether it's high probability, reasonable likelihood, whatever the standard might be as they would articulate it, the Government could meet that standard only with substantive evidence of its case. The case law and the Eleventh Circuit law as it stands says the Government is not obligated to do that and need not, because that is not the issue before the Court.

Were we in a different posture at this point, where the Defendants were actually in the case, they would have [33] other opportunities –

THE COURT: What do you mean actually in the case?

MR. WATTS-FITZGERALD: Well, they're not really in the case, Your Honor. We don't even have an arraignment yet. They're not in a position where they could file a motion to dismiss the indictment on a limited basis. The Court would make them come in for that. Generally, they can't attack the indictment until they come into the case. They're trying to attack the indictment, the underlying indictment here, through the backdoor. They're trying to do it to the

restraint issue, but they're not entitled to attack the indictment.

And if you look at what Congress has done and what I've just described the courts have done, you see that 21 853 actually puts in place some procedural protections, but it bifurcates it. And the Congressional statement is if you are preindictment, restraint must be demonstrated. There are certain protections, but that's not the posture this case is in. So the Government doesn't have to demonstrate the substantial likelihood of success because we're under the second portion of 853. We're post-indictment. The grand jury has found probable cause through – and this is the superseding indictment, of course, I'm referring to.

Once we have a facially valid indictment, we go forward, absent some very strict and limited circumstances, none of which are applicable here. All we're here for is to [34] see and determine if the property and/or the proceeds – and I want to make a little bit of a point of that, because counsel keeps talking about the cash or the bonds or the property. It extends to the proceeds, as well. And that's important for legal reasons that the Court's aware of when we get to that stage later in the proceedings.

But the traceability and involvement is the only issue, and my colleague has indicated they intend to put on no evidence challenging that aspect of the matter. And I understand they're posturing themselves or trying to tee this up for another appeal, and

that's fine. Were the Government to lose, I would have to admit that we would be seriously considering appealing, because the only way for us to win here before the Court under their approach is to put on our evidence.

Why would we try the case twice? All the courts at the appellate level that have looked at this have recognized that that's a substantial issue. The Court gave them, after reanalysis under the Eleventh Circuit decision as expressed by Judge Marcus, exactly what they were entitled to, this session. What Judge Marcus said was if we were to apply Matthews in this case, it would be a pretrial hearing on the merits of the protective order, not on the merits of the indictment, not on the merits of the PC finding, not on the merits of the underlying criminal case, but solely on the [35] protective order. And the only, only issue there, under 21 U.S.C. 853, post-indictment is is it traceable. They've conceded that.

The Court discussed with counsel a number of very fact-specific issues and scenarios. We, of course, would argue that their approach to that is incorrect. The idea that apparently the Government only charged stealing in the indictment. Well, that's not correct. The constant refrain in their pleadings, that the Government is bound because it only chose to argue to the jury one particular manner or means at the conclusion of the evidence in that case does not bind the Government with respect to them. In fact, as the Court is well aware, the indictment charges four different ways in which prescription medical devices

were stolen, converted or taken by fraud. All four of those are available. The election to argue a certain way to a jury based on the evidence in that case doesn't establish a substantive benefit or entitlement to the Defense.

They like to talk about the bill of particulars, and yet their own cases cited in the footnote of their pleading filed this morning at 10:42 says you've got to be a participant. It's entered for you. And, in fact, this was not entered, and that's why I raise the issue. They're not party to the proceeding. They were not party to the proceeding before the Court in the coconspirator/codefendant's [36] trial. That order was not entered with respect to them. They want to hold –

THE COURT: Which order are you referring to?

MR. WATTS-FITZGERALD: This was the bill of particulars that was required. That bill of particulars in fact says in it it's limited to Gruenstrass only, because there is other evidence. They've stood here and said there was no evidence of theft or complaints by hospitals with respect to Gruenstrass. Who cares? Gruenstrass is not on trial anymore. There will be in this case evidence of theft from one of the hospitals. There, in fact, have been complaints. They don't know it because they don't have discovery. They're not in the case yet. But that's a factual-based issue. What can the Government prove? Can it sustain its burden?

Your Honor, I would submit if our case was so inadequate, as they would like to pitch it under the available arguments – and they can move in limine at the appropriate time to limit the Government and make all these substantive arguments then – the Court would take one or more of the charges away at the Rule 29 at the latest. You might even decide pretrial, under certain limited circumstances, to cut the case down. But whatever the Court were to rule here with respect to this specific issue of the restraint of the assets, the case does not go away, counsel's certainly correct in [37] that.

THE COURT: What – what is the basis for your position that the only thing I have to look at is the traceability of the assets to the alleged criminal conduct and not beyond – go beyond that in terms of determining whether the protective order should remain in place?

MR. WATTS-FITZGERALD: Bissell, Docket Entry 188, which is the appellate decision by Judge Marcus, and the plain language of his statement.

THE COURT: Whose statement?

MR. WATTS-FITZGERALD: Judge Marcus' statement that I read from page 27 of the slip opinion, page 29 of the docket entry. The middle of the page has a small paragraph where he says even under Matthews they would only get a hearing on the merits of the protective order. You have to read that in light of 21 U.S.C. 853, because that's the Congressionally established statute under which the restraint

is occurring, and it says PC of a grand jury is an adequate protection at law, no court of competence jurisdiction.

And this decision says that in this circuit, certainly as of today that's all you get, because you cannot reconcile that statement in Bissell with requiring the Government to an explication of its substantive evidence in the case.

I mean, I could talk about, well, the trial evidence [38] in Gruenstrass, the witness Your Honor was referring to, the hospital – well, let's – let's be real clear on it, the retired hospital employee who was unable to produce a piece of paper showing any transfer or any authorization for her to do that. I cross-examined her. She said on the record, no, I didn't own it. I didn't buy it. It wasn't mine. Gee, maybe I don't really have the authority to give it out. She probably didn't say that in so many words. That was the implication.

She couldn't record or provide any record to show what she had given, when, where or why. Whatever made the jury reach its decision really doesn't matter, because on the same set of charges, a jury could decide that this and these defendants, in fact, were guilty.

THE COURT: Was I correct in my recollection, or maybe it didn't really come up this specifically, but did Mrs. [sic] Gruenstrass have in her vehicle items that were actually given to her by Ethicon that were

Ethicon, or was everything in her car things that were acquired from other hospitals?

MR. WATTS-FITZGERALD: Your Honor, I believe the record would show – well, Ms. Gruenstrass, of course, declined to take the stand and subject herself to cross-examination. So we don't know what was in the trunk of her car. There's really no testimony about that.

What there was from some of the other former reps was [39] testimony that at times they would have things in their car. One of the things that you will also find in the record from those individuals was that at times those would be sample materials, where they got a sample budget from their employer which they could use to acquire materials, product of their company, prescription medical devices, and some of them indicated at times they would use those of their employer's, clearly not their's, to their advantage by swapping out in sort of the transfer situation the Court was hypothesizing. And that is in the record, where people would swap and trade, and then reps would turn around and sell it. And that's one of the four methods under the manner and means of count 1, the conspiracy count the Government cites to, as to how they would acquire product in which they had no right, title and interest and sell it to their own advantage.

And I sort of took the point the Court said about what's the true issue of whether you're an employee at-will or not? We have the nondisclosure-noncompete

agreement signed by Kerri Kaley in this case. If that doesn't have fiduciary duty written all over it, no lawyer ever drafted a fiduciary agreement. In fact, the page that I brought in – and this was an error by the supplier and not by counsel in any way – was replete with representations about not selling in competition, not taking charge or custody of materials, being very careful in the dealings resulting in relationships built [40] up with the customers and clients.

Does it matter that Ethicon or hospitals have not come forward to embarrass themselves by admitting that they had – I mean, Counsel has put in the record for the Court that the Government convicted more than 20 other representatives in somewhat similar circumstances. It's not surprising that a large public corporation doesn't want to advertise to the world that its trusted employees were not only self-dealing and stealing product but violating their noncompete clauses and selling into the black market prescription medical devices that have the capacity to hurt individuals and be improperly used. They have liability issues. I'm not surprised they didn't get out there and wave a flag over it, or the hospitals to the degree, to the extent they didn't have adequate inventory control oversight or cross-checking audits in place.

We don't need to prove that somebody complained. I can't find that as an element of the offense in any theft charge. And I believe there will be here, as in the other case, substantial circumstance – I'm

sorry, significant circumstantial evidence that a jury could find the various theft charges proved.

What we really are looking at, Your Honor, is a direct challenge to the indictment, not to the sequestration. Were we not so far advanced, but given the passage of time, [41] the Government would be submitting to the Court the suggestion that it might be appropriate to reconsider the financial circumstances of the Defendants. A lot of time has passed.

We lost the better part of two and a half years. We don't know what their financial circumstances are. That was a big factor among the four factors that Magistrate Hopkins and the Court had to consider in conducting the analysis. And, of course, the Eleventh Circuit really only sent back on one of the four, because that was the one that they had focused on for obvious reasons.

Financial circumstances may have changed. They may today be able to afford the illustrious counsel before the Court today, but changed circumstances will still inevitably I think lead us back to the Eleventh Circuit.

THE COURT: Let me ask you, assuming that I agree with the Defense's position of how I should apply both the Eleventh Circuit decision in this case and the Bissell case and all the other decisions they rely on, and that you have to come forward with some showing to convince me that you have a likelihood of success on the merits, is there anything in the record for me to be able to do that? Is there

anything that satisfies that burden, assuming that I ultimately agree that that is what's required?

MR. WATTS-FITZGERALD: For these Defendants, because the other case was not focused on them, we would have to come [42] forward with more. My question, or the question that poses itself to me, Your Honor, is do I show you 51 percent of my evidence in case? Do I bring in affidavits? Do I put on other witnesses? Do I ask you to look at sealed affidavit and take that into account because it's a fairly extensive explication?

THE COURT: You objected to me doing that.

MR. WATTS-FITZGERALD: I objected to you giving it to them, Your Honor.

THE COURT: Oh, okay.

MR. WATTS-FITZGERALD: I sort of suspect the Court's always entitled to look at a sealed document, Your Honor. That occurred to me a few days ago because of the way the Court ruled on that, and I said to myself, okay, I take implicit that you have not, but you could.

THE COURT: Well, I did a few years ago when I had to do the original order, but I haven't read it since.

MR. WATTS-FITZGERALD: And I would not expect you to remember it, Your Honor. It's fairly lengthy and detailed, and, you know, it's a sworn affidavit.

But I don't know how I would want to argue and have to think about the issue of what more that gives you beyond the grand jury's finding of probable cause. It certainly gives you something, but it's not the same thing as putting on the witnesses, allowing cross-examination and trying the case, [43] which is what we've been trying to do all these many years.

THE COURT: So it sounds like the Defense agrees that if I adopt your legal position they lose, and I adopt – you agree that if I adopt the Defense's legal position you lose on this record.

MR. WATTS-FITZGERALD: Your Honor, I would anticipate that as a result of this, which is just a motion hearing, you would order us to do something, and I would try and figure out how we would do that, and my appellate people would tell me not only no, but in very draconian terms no because of the precedent that that would establish for every asset forfeiture case. The Government would be trying every case twice, and so they would tell me sit around for another two years, Tom, we'll handle it from here.

THE COURT: Okay. Do you have any objection if I in camera either look at the agent's affidavit or the grand jury testimony?

MR. WATTS-FITZGERALD: None, Your Honor.

THE COURT: Okay. I don't know if the grand jury testimony's ever been transcribed. Has it?

MR. WATTS-FITZGERALD: Now, Your Honor, when you say grand jury transcript and they do, you're probably talking about different sets of transcripts. I take it that you'd be looking at the substantive testimony of witnesses for purposes of determining if we have the – enough evidence to be likely [44] to prevail. The transcripts they were really asking for were more the transcripts of advice to the grand jury and that sort of thing, the nondeliberative part of it, because, of course, there is no transcript of the deliberations.

They've raised on occasion an issue that they couch in terms of how was the jury charged or what scope of conduct did they have in mind. My answer to that is the Court need not and probably should not inquire into that, because the document under a long line of cases addressing grand jury indictments stands on its own at this point, and absent more, the Court does not go behind the face of a facially valid indictment.

But were the Court interested in looking at the substantive testimony of various witnesses, I haven't really thought that one through. I would normally say no, Your Honor, except for the fundamental notion that we're not supposed to be assessing the substantive evidence of the case under our view of the case law. I'd have to think that one through, I think.

Were the Court inclined to go in that direction and then issue an order telling us you have to do something, I would ask the Court to perhaps give us a

little bit of time. Having received the pleading literally as we were packing to drive here this morning, we have not responded obviously to the supplement, Docket Entry 221.

[45] THE COURT: Well, I guess I'm going to ask defense counsel this question, but – what their position is on it. But assuming I thought – I agreed with the Defense that you had some burden of proof here in order to establish a likelihood of success, or whatever standard I conclude is required, something beyond what you're saying, I just look to see whether or not there's a connection of the assets to the alleged criminal activity – I'm going to ask the Defense if they – what their position is – would looking at the grand jury testimony and the agent's affidavit be evidence that I can consider in determining whether that burden is met? I have a feeling they're going to say no because they didn't have a chance to cross-examine any of those people. But I'm just wondering if I conclude that that is a requirement or that you need something more than what's here, would you think that the grand jury testimony or the agent's affidavit could be used to supply the necessary evidence to meet that burden?

MR. WATTS-FITZGERALD: It would supply a quantum of the evidence, Your Honor. Is it whatever that statistical or numerical number is to show a likelihood of substantial? I'm not sure what that number is. But I do know that the grand jury was only looking for probable cause, and I do know that the Government didn't put all of its evidence in

the grand jury. There were obviously trial witnesses that never showed in the grand jury, and there would be more trial witnesses in [46] this case that weren't in the grand jury that we would be using to sustain our burden. So that just isn't there for the Court through that mechanism.

If the Court looked at that material, all the witnesses, and at the end of it said, yes, the Government has met the burden, because not only did they demonstrate PC, but I'm satisfied they have shown a substantial likelihood, I sure wouldn't argue with you, but I would think there is at least a possibility that you would not necessarily get to that conclusion, and we would then be in a position of having to go forward with even more evidence.

THE COURT: Okay. Thank you.

Counsel, do you have a position as to whether, in meeting the burden that you say the Government has in this matter, whether my looking in camera at the grand jury testimony or the agent's affidavit would allow me to use that in coming to that determination?

MR. SREBNICK: I certainly don't have an objection to you looking at it, but I don't think that that would comport with due process, since it wouldn't constitute a hearing where we would have an opportunity to be heard about what you had seen. So while we have no objection, we don't think that that is sufficient to satisfy due process.

THE COURT: All right. And what was it specifically that you wanted me to look at in terms of the grand jury?

[47] MR. SREBNICK: Oh, it was in the context of our concern that there's been a constructive amendment of the indictment. And what I mean by that is that the Government has changed its theory of ownership, who owned the devices at the moment that the sales representatives took custody. We have every reason to believe that the grand jury was presented with the theory that these devices were owned by the hospitals, and that the hospitals were the victim – victims of this alleged theft. The reason we know that is because the sentencings of codefendants who all pled guilty, some quite reluctantly, that was the theory that was presented and restitution ordered, at least in Mr. Tarsia's case, an alleged coconspirator. And so we assume and have every reason to believe that that was the theory the Government proceeded under before the grand jury, and I believe Mr. Tarsia was a grand jury witness, that having been revealed during the Government's trial against Ms. Gruenstrass.

After the grand jury returned its indictment, the Government issued the bill of particulars, which is a bill of particulars in our case, even though Ms. Gruenstrass was the only defendant going to trial. In the bill of particulars and then during the trial itself, the Government eschewed the theory that the hospitals were the owners and proceeded under this agency theory that Ethicon somehow became the owner.

So we wanted you to see from the grand jury minutes [48] or the transcripts what did the Government present to the grand jury by way of theory of ownership, what jury instructions, so to speak, were given to the grand jury, so that you can determine whether the Government has been shifting its theory of ownership to suit its prosecutorial needs. The grand jury is the one that's supposed to accuse, not the prosecutor. So that's why we wanted that.

THE COURT: So you weren't asking for me to actually look at the witnesses' testimony?

MR. SREBNICK: That's not what we were focused on. We were focused on the issue of ownership.

If I could just have one more moment?

MR. WATTS-FITZGERALD: Your Honor, while Counsel's conferring, I should have clarified, and I didn't, and I beg the Court's indulgence. The type of transcript material Counsel's referring to, the nonsubstantive nonwitness, is not – or as a matter of course or practice transcribed. The Government doesn't order it. I've never heard for a need for it before. I assume that it would be available, because court reporter firms are supposed to keep the stuff forever. But depending on their equipment and other issues, we're talking an indictment that goes back a long ways.

THE COURT: You're saying it may take some time to get that transcribed if I wanted to look at it?

MR. WATTS-FITZGERALD: I'm saying if I was ordered to [49] it would take some time, and I'm not guaranteeing as I stand here that we would get it all or that its available, not through any, you know, Franks v. Delaware issues. No one tells them to lose it or get rid of it, but people come and go, court reporters retire, and notes are very individual in that regard, Your Honor.

THE COURT: Okay.

MR. SREBNICK: If I could just have a moment with counsel?

(Brief pause in proceedings.)

MR. SREBNICK: Judge, we agree on something. I've asked them if they have any objection to allowing the Kaleys – oh, I should say I have nothing further to present on the issue of the restraining order. You've got our submission.

We have agreement, the Government has no objection to allow the Kaleys, who have now been on bond for close to three or four years, that they can travel within the continental United States with advance notice to their probation office so they can take their kids to some lacrosse matches and things of that nature. We would ask the Court to modify their bond condition to allow that.

THE COURT: I have no problem with doing that.

MR. SREBNICK: Thank you, Judge.

With that, we have nothing else to present today.

[50] THE COURT: All right. Well, thank you very much.

Sounds like either way we're going to have another appeal and another delay in this case.

MR. SREBNICK: I believe so, Judge.

MR. WATTS-FITZGERALD: What more noble way to spend money than on attorney's fees, Your Honor?

MR. SREBNICK: On that note, I would like the Court to note that I have not been paid since the day of the indictment. I am doing this –

MS. VAN DUSEN: And I join in that.

MR. WATTS-FITZGERALD: We all have a pro Bono obligation.

Your Honor, I would like to bring the Court's attention to document 220-5, which was filed yet again in this matter. That's the Tarsia transcript. Counsel just referred to it a moment ago about the restitution and the issues.

The restitution there of $247,000 was paid to the hospital in that case, and the reasoning there – and there was some citation to a limited amount of

discussion. There was some very interesting discussion as we went through it. I recall it vividly. It was up here in the loaner courtrooms down the road here, was the difficulty that that case highlighted in identifying where a specific item that showed up in Mr. Danks' warehouse in Delray had come from. And in that case, Mr. Tarsia was able to identify it as coming from [51] a – if I get the pronunciation, Maimonides?

MR. SREBNICK: My Maimonides.

MR. WATTS-FITZGERALD: Yeah, what he said, Your Honor, Maimonides Hospital, in New York, which was one of his principal sites. So the money was directed there because that's where he took it from, despite his counsel's tap dancing and everything else, which occasionally does happen at sentencing.

THE COURT: All right. Anything else?

All right. Thank you all for your presentations, and I'll wrestle with the issue and I guess wait for the Eleventh Circuit to tell me if I get it right the second time.

(Proceedings concluded.)

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 12-464

Supreme Court, U.S.
FILED
JUL 1 - 2013
OFFICE OF THE CLERK

In The

Supreme Court of the United States

KERRI L. KALEY and BRIAN P. KALEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' MERITS BRIEF

HOWARD SREBNICK
Counsel of Record
BLACK, SREBNICK, KORNSPAN & STUMPF, P.A.
201 South Biscayne Blvd., Suite 1300
Miami, FL 33131
(305) 371-6421
HSrebnick@RoyBlack.com

G. RICHARD STRAFER
Co-Counsel for Petitioners
G. RICHARD STRAFER, P.A.
201 South Biscayne Blvd., Suite 1380
Miami, FL 33131
(305) 374-9091
StraferPA@aol.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress
Law Library

QUESTION PRESENTED

When a post-indictment, ex parte restraining order freezes assets needed by a criminal defendant to retain counsel of choice, do the Fifth and Sixth Amendments require a pretrial, adversarial hearing at which the defendant may challenge the evidentiary support and legal theory of the underlying charges?

LIST OF PARTIES

The United States of America brought this criminal case against Kerri L. Kaley, her husband Brian P. Kaley, and Jennifer Gruenstrass.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	6
A. The Grand Jury Investigation and Retention of Counsel of Choice	7
B. The Guilty Pleas of Other Sales Representatives	8
C. The Indictment and Protective Order	11
D. The First Motion to Vacate	12
E. The Superseding Indictment and a Second Round of Motions	14
F. The Evidentiary Hearing	15
G. The District Court's Ruling	17
H. The Gruenstrass Trial	17
I. The Eleventh Circuit's Decision in *Kaley I*	23
J. The District Court's Rulings on Remand	25
K. The Eleventh Circuit's Decision in *Kaley II*	27

TABLE OF CONTENTS – Continued

Page

SUMMARY OF THE ARGUMENT 29

ARGUMENT 32

Due Process Requires a Pretrial, Adversarial Hearing When an Ex Parte Protective Order Restrains the Assets a Criminal Defendant Needs to Retain Counsel of Choice 32

A. *Mathews v. Eldridge*, 424 U.S. 319 (1976), Provides the Correct Framework to Determine Whether Procedural Safeguards are Adequate 33

1. *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969) 36

2. *Fuentes v. Shevin*, 407 U.S. 67 (1972) 36

3. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) 39

4. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) 40

5. *Connecticut v. Doehr*, 501 U.S. 1 (1991) 41

6. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) 43

B. *Barker v. Wingo*, 407 U.S. 514 (1972), Provides the Appropriate Framework Only When a Party Seeks Dismissal of the Government's Case 46

TABLE OF CONTENTS – Continued

Page

C. When the Right to Counsel of Choice is at Stake, the *Mathews* Test Requires a Hearing at Which Defendants May Challenge Probable Cause 51

1. The Kaleys' Private Interests..... 51

2. The Risk of Erroneous Deprivation..... 56

3. The Government's Interests..... 61

CONCLUSION..... 64

TABLE OF AUTHORITIES

Page

CASES:

Ake v. Oklahoma, 470 U.S. 68 (1985) 62

Alvarez v. Smith, 558 U.S. 87 (2009) 48, 51

Armstrong v. Manzo, 380 U.S. 545 (1965) 30

Atkins v. Parker, 472 U.S. 115 (1985) 34

Barker v. Wingo, 407 U.S. 514 (1972) .....*passim*

Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 122 N.E. 378 (1919) 26

Bell v. Burson, 402 U.S. 535 (1971) 34

Berman v. Sugo LLC, 580 F. Supp. 2d 191 (S.D.N.Y. 2008) 26

Black v. Romano, 471 U.S. 606 (1985) 34

Boddie v. Connecticut, 401 U.S. 371 (1971) 34

Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) 32

Caplin & Drysdale, Chtd. v. United States, 491 U.S. 617 (1989) 29, 52

Carroll v. Princess Anne, 393 U.S. 175 (1968) 57

C.I.R. v. Shapiro, 424 U.S. 614 (1976) 31, 54

City of Los Angeles v. David, 538 U.S. 715 (2003) 33

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 34

Conn v. Gabbert, 526 U.S. 286 (1999) 59

Connecticut v. Doehr, 501 U.S. 1 (1991) .....*passim*

TABLE OF AUTHORITIES – Continued

Page

Costello v. United States, 350 U.S. 359 (1956) 58

Dusenbery v. United States, 534 U.S. 161 (2002).....34

F.D.I.C. v. Mallen, 486 U.S. 230 (1988) 34

Fuentes v. Shevin, 407 U.S. 67 (1972).....*passim*

Fusari v. Steinberg, 419 U.S. 379 (1975).....34

Gerstein v. Pugh, 420 U.S. 103 (1975) 43

Gilbert v. Homar, 520 U.S. 924 (1977).....34

Goldberg v. Kelly, 397 U.S. 254 (1970).....34

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 33

Harmelin v. Michigan, 501 U.S. 957 (1991) 56

Johnson v. American Credit Co., 581 F.2d 526 (5th Cir. 1978) 39

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).....37, 45

Krimstock v. Kelly, 306 F.3d 40 (2d Cir. 2002).....50

Libretti v. United States, 516 U.S. 29 (1995).....61

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980).....56

Mathews v. Eldridge, 424 U.S. 319 (1976).....*passim*

Medina v. California, 505 U.S. 437 (1992) 34

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) 34

Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989).....59

TABLE OF AUTHORITIES – Continued

Page

Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974)....*passim*

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).....40, 41, 60

Parham v. J.R., 442 U.S. 584 (1979).....33

Philip Morris USA v. Williams, 549 U.S. 346 (2007).....33

Santosky v. Kramer, 455 U.S. 745 (1982).....34

Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49 (2005).....34

Smith v. City of Chicago, 524 F.3d 834 (7th Cir. 2008).....50

Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969).....36, 38, 61, 63

Turner v. Rogers, 131 S. Ct. 2507 (2011).....33, 55

United States v. A Parcel of Land (92 Buena Vista Avenue), 507 U.S. 111 (1993).....52, 61

United States v. Bissell, 866 F.2d 1343 (11th Cir.), *cert. denied*, 493 U.S. 876 (1989).....*passim*

United States v. Calandra, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974).....58

United States v. Cotton, 535 U.S. 625 (2002) 57

United States v. Dionisio, 410 U.S. 1 (1973).....58

United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency, 461 U.S. 555 (1983).....46, 47, 48, 49, 50

TABLE OF AUTHORITIES – Continued

Page

United States v. E-Gold, Ltd., 521 F.3d 411, 380 U.S. App. D.C. 310 (D.C. Cir. 2008) 28, 54

United States v. Funds Held ex rel. Wetterer, 210 F.3d 96 (2d Cir. 2000) 56

United States v. Ginsburg, 773 F.2d 798 (7th Cir. 1985) 53

United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) 32, 53

United States v. Goodrich, 871 F.2d 1011 (11th Cir. 1989) 21, 23

United States v. Holzer, 840 F.2d 1343 (7th Cir. 1988) 22

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) ..... *passim*

United States v. Laura, 607 F.2d 52 (3d Cir. 1979) 53

United States v. Little, 889 F.2d 1367 (5th Cir. 1989) 22

United States v. Lopez-De La Cruz, 431 F. Supp. 2d 200 (D.P.R. 2006) 62

United States v. Mandujano, 425 U.S. 564 (1976) 57, 59

United States v. Miller, 997 F.2d 1010 (2d Cir. 1993) 22

United States v. Monsanto, 491 U.S. 600 (1989) 29, 55

United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991) 28

TABLE OF AUTHORITIES – Continued

Page

United States v. Moya-Gomez, 860 F.2d 706 (7th Cir. 1988) 33

United States v. Ochs, 842 F.2d 515 (1st Cir. 1988) 22

United States v. Runnels, 877 F.2d 481 (6th Cir. 1989) 22

United States v. Salerno, 481 U.S. 739 (1987) 62

United States v. Sells Engineering, Inc., 463 U.S. 418 (1983) 58

United States v. Shelton, 848 F.2d 1485 (10th Cir. 1988) 22

United States v. Slay, 858 F.2d 1310 (8th Cir. 1988) 22

United States v. Stack, 853 F.2d 436 (6th Cir. 1988) 22

United States v. Thompson, 251 U.S. 407 (1920) 59

United States v. Von Neumann, 474 U.S. 242 (1986) 46, 49, 50

United States v. Walgren, 885 F.2d 1417 (9th Cir. 1989) 22

United States v. Williams, 504 U.S. 36, 112 S. Ct. 1735, 118 L. Ed. 2d 352 (1992) 58

United States v. Zauber, 857 F.2d 137 (3d Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989) 22

Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985) 34

TABLE OF AUTHORITIES – Continued

Page

Wardius v. Oregon, 412 U.S. 470 (1973) 61

Weiss v. United States, 510 U.S. 163 (1994) 34

Wheat v. United States, 486 U.S. 153 (1988).....53

Wilkinson v. Austin, 545 U.S. 209 (2005).....33

Wood v. Georgia, 370 U.S. 375 (1962) 57

Zinermon v. Burch, 494 U.S. 113 (1990).....33

CONSTITUTIONAL AND STATUTORY AUTHORITY:

U.S. Const. amend. IV 43, 44

U.S. Const. amend. V .....*passim*

U.S. Const. amend. VI.....*passim*

U.S. Const. amend. XIV 38

18 U.S.C. § 981(a)(1)(C).....12

18 U.S.C. § 982 .....2, 14

18 U.S.C. § 1512(b)(3).....11, 55

18 U.S.C. § 1956(h).....14

18 U.S.C. § 2314 .....*passim*

18 U.S.C. § 3142(g) 62

21 U.S.C. § 853 2

21 U.S.C. § 853(e) 4

21 U.S.C. § 853(e)(1)(A).....6, 12, 32

21 U.S.C. § 853(e)(1)(B)(i) 32

28 U.S.C. § 2461(c) 12

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITY:

Fed. R. Crim. P. 6(c) 13

Fed. R. Crim. P. 6(d)(1) 58

Fed. R. Crim. P. 6(f) 13

Fed. R. Crim. P. 16 61

Fed. R. Crim. P. 41(e) 48, 49

USDC, SD Fla. Rule 88.7 13

Brief for the United States, *United States v. $8,850*, No. 81-1062 (June 28, 1982), 1982 U.S. S.Ct. Briefs LEXIS 530 ..... 47, 48, 49

Campbell, William J., *Eliminate the Grand Jury*, 64 J. Crim. L. & Criminology 174 (1973) 58

Kuckes, Niki, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 Am. Crim. L. Rev. 1 (Winter 2004) 58

OPINIONS BELOW

The Court of Appeals for the Eleventh Circuit affirmed the decision of the District Court for the Southern District of Florida denying Petitioners' motion to vacate a pretrial restraining order. The Eleventh Circuit's decision is reported at 677 F.3d 1316 (11th Cir. 2012), and is reprinted in the Certiorari Petition Appendix ("Pet. App.") 1-37. The Eleventh Circuit's opinion from the first interlocutory appeal is reported at 579 F.3d 1246 (11th Cir. 2009). Pet. App. 48-93. Orders of the district court are unreported. Pet. App. 38-47, 94-117. A list of relevant docket entries of the district court ("DE") is provided in the Joint Appendix ("JA") at 1-28.

JURISDICTION

The Eleventh Circuit issued its opinion on April 26, 2012, Pet. App. 1-37, and denied rehearing on July 17, 2012. Pet. App. 113-14. A petition for a writ of certiorari was filed on October 11, 2012, and granted on March 18, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. V.

No person shall be . . . deprived of life, liberty or property, without due process of law . . . .

U.S. CONST. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

18 U.S.C. § 982 – Criminal forfeiture

(a)(1) The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

* * *

(b)(1) The forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the provisions of section 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 853).

18 U.S.C. § 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . –

Shall be fined under this title or imprisoned not more than ten years, or both.

21 U.S.C. § 853. Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law –

> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
>
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation . . . .

* * *

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section –

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that –

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

STATEMENT OF THE CASE

This case involves a challenge to an ex parte protective order entered in a criminal case "upon the filing of an indictment." 21 U.S.C. § 853(e)(1)(A). The protective order restrains Petitioners' assets, which the government alleges are subject to forfeiture upon conviction.

Petitioners moved to vacate the protective order so that they could use the restrained assets to retain counsel of choice and pay related legal expenses. Because the statute does not provide for any hearing, Petitioners argued that the Fifth Amendment guarantee of due process and the Sixth Amendment right to counsel of choice entitled them to a pretrial, adversarial hearing to challenge the government's legal theory and evidentiary support for the underlying charges that purportedly justified the restraint.

The courts below ruled that Petitioners were not entitled to the hearing requested; rather, Petitioners could only challenge traceability – whether the assets restrained are traceable to the conduct charged in the indictment supporting the forfeiture count. Petitioners were not permitted to challenge the grand jury's finding of probable cause.

Petitioners submit that the Fifth and Sixth Amendments require a pretrial hearing at which the government must establish a substantial probability of succeeding in obtaining forfeiture of the restrained assets, failing which, the assets needed for counsel of choice and legal expenses must be unfrozen.

A. The Grand Jury Investigation and Retention of Counsel of Choice

Petitioner Kerri Kaley was a sales representative for Ethicon Endo-Surgery, Inc. ("EES"), a subsidiary of Johnson & Johnson, Inc. ("J&J"), selling prescription medical devices ("devices" or "PMDs") to hospitals in the New York area.[1] JA 30 (DE 1); Pet. App. 3. In January 2005, an agent of the Food and Drug Administration informed her that she and other sales representatives were under investigation for "stealing" and thereafter selling PMDs to a company in Florida, F&S Medical, Inc., that was involved in the "black" or "gray" market. Pet. App. 3; DE 184:49, 51.

Kerri retained defense counsel in Miami, Florida, to represent her. Pet. App. 3. Kerri's husband, Petitioner Brian Kaley, retained his own counsel when it appeared that he, too, was targeted for shipping the PMDs from New York to Florida and depositing checks into his business account reflecting payment for the PMDs. *Id.* Over the next two years, the attorneys represented Kerri and Brian[2] in an effort to stave off an indictment. *Id.* The Kaleys regularly discussed the case with their attorneys by telephone and made several trips to Florida to meet face-to-face

---

[1] The PMDs sold by EES consisted of "laparoscopic and mechanical devices, anything from trocars, clips, bags, harmonic scalpels, endo-cutters, ligation devices, basically anything related to surgery in the cardiac/thoracic/GYN arena." DE 184:89.

[2] To avoid confusion, the Kaleys will be referred to by their first names, Kerri and Brian.

and review documents demanded by the grand jury. DE 17:4-6. Defense counsel met with the prosecutor to understand the government's theory and to present a defense to the allegations. *Id.*

Anticipating an indictment and a multi-week trial, the Kaleys applied for a $500,000 equity line of credit on their home to pay legal fees and expenses estimated by counsel. Pet. App. 3. The Kaleys drew on that line of credit to purchase a $500,000 certificate of deposit ("CD") that would earn interest until the Kaleys liquidated the CD to pay for the projected legal expenses. *Id.*

No indictment was returned in 2006. In early 2007, the Kaleys rolled over the CD into a new one, adding to it approximately $60,000 earned from other sources. *Id.*; DE 99:74; Pet. App. 95 n.2.

B. The Guilty Pleas of Other Sales Representatives

As the investigation progressed, the government secured plea agreements from other sales representatives, including Frank Tarsia and Alan Schmidt, who had obtained PMDs from hospitals and given them to Kerri for resale.

At Tarsia's sentencing on September 20, 2006, the prosecutor explained to the Honorable Kenneth Ryskamp of the U.S. District Court for the Southern District of Florida how the gray market developed. Sales representatives obtained the PMDs from staff

members at hospitals that had excess inventory of a particular device because, for example, the model of the device had been superseded by a new one. DE 105-1:16. As the prosecutor indicated, the staff would tell the sale representatives: "'I have got too much, I don't need it, take it away, I don't want it.'" DE 105-1:15. Judge Ryskamp wondered aloud "[w]ho is the victim" of this practice? The prosecutor claimed that the sales representatives should have returned the unwanted PMDs to their employer "[f]or credit" but conceded that "[t]he company doesn't like to do it, of course." DE 105-1:17.

Judge Ryskamp saw the implications: "The company might not be a victim then, because if [the sales representatives] turned [the PMDs] into the company, [the company] would have to pay credit [to the hospitals]. If the unit went elsewhere where nobody knew, they would be ahead of the game, right?" *Id.* The prosecutor then denied that the sales representatives' employers were the victims:

[AUSA]: So the company, once it gets in the hands of a medical facility, the company doesn't own it anymore.

THE COURT: So the company isn't a victim here.

[AUSA]: No.

DE 105-1:17.

Judge Ryskamp then questioned whether the hospitals were victims either, given that the hospitals

apparently "don't want this stuff" and were "willing to give it to whoever will take it off their hands." DE 105-1:17-18. The parties were nonetheless willing to proceed, so Judge Ryskamp obliged and sentenced Tarsia to 5 months in prison and $247,916.63 in restitution to a hospital in Brooklyn that had never complained about thefts and had produced "no records" to prove that anything was missing. DE 105-1:19, 33, 36.

On January 8, 2007, another former sales representative, Alan Schmidt, was sentenced by the Honorable William Zloch of the U.S. District Court for the Southern District of Florida. DE 70-1. Schmidt explained that EES sales representatives would obtain obsolete or unwanted PMDs from hospitals. He admitted giving the devices to Kerri, who sold them and gave Schmidt a share of the proceeds. DE 70-1:8. As Schmidt explained, if the hospitals "had something old on the shelf . . . you know, product A was superseded by product B, which was newer, lighter, faster, better, whatever, then product A sat on the shelf. . . ." DE 70-1:10.

Judge Zloch questioned how the gray market could have existed for so long without the hospitals noticing that "these items were all of a sudden missing." DE 70-1:11. The prosecutor had no answer, confessing that although the government had looked at "hundreds of medical facilities . . . we can't make restitution because their records are so bad and these items are not individually serialized. I have better accounting with my kids' allowance than some of

these places did." *Id.* Judge Zloch sentenced Schmidt to 6 months in prison, but this time the prosecutor did not seek a restitution order, admitting that "we can't make restitution. There is no readily identifiable [victim]." DE 70-1:12.

C. The Indictment and Protective Order

On February 6, 2007, the Kaleys and another sales representative, Jennifer Gruenstrass, were charged in a 7-count indictment. JA 29-43 (DE 1). Count 1 alleged that they conspired between 1995-2005 to: (A) transport PMDs that were "stolen, converted, or taken by fraud" in violation of 18 U.S.C. § 2314; and (B) to defraud the Food and Drug Administration. JA 31-32. Counts 2-6 charged five substantive offenses under § 2314, each based on a specific check reflecting payment for allegedly stolen PMDs. JA 38. Count 7 charged the defendants with obstructing an "official proceeding" in violation of 18 U.S.C. § 1512(b)(3). JA 39 (DE 1:9). The indictment did not charge money laundering.

The indictment alleged that the Kaleys, Gruenstrass and others acquired PMDs, packed them at the Kaleys' residence in New York, and shipped them to F&S Medical, Inc. in Florida in return for payment by way of checks payable to Kerri or a company owned by her husband Brian. JA 33. The checks were deposited into bank accounts associated with the Kaleys. *Id.* Kerri would thereafter issue

checks to Gruenstrass and other sales representatives for their share. *Id.*

The indictment concluded with a demand for criminal forfeiture of all property constituting "proceeds" of the § 2314 charges "and all property traceable to such property, including but not limited to a money judgment in the amount of $2,195,635.28 and the CD."[3] JA 40.

Along with the indictment, the government obtained an ex parte Protective Order, under the authority of 21 U.S.C. § 853(e)(1)(A) and 28 U.S.C. § 2461(c), restraining all "the property listed for forfeiture in the indictment," including the CD. JA 44-47 (DE 6).

D. The First Motion to Vacate

At their first appearances in Florida on February 26, 2007, the Kaleys were represented by their pre-indictment counsel. Because the Protective Order prevented the Kaleys from using any of their funds to retain counsel for trial, neither counsel entered a "permanent appearance" as trial counsel. Rather, counsel entered temporary appearances, limited to

---

[3] Because § 2314 is not a crime for which forfeitures are authorized under any *criminal* forfeiture statute, the indictment sought forfeiture indirectly under 18 U.S.C. § 981(a)(1)(C), a provision of the *civil* forfeiture statute that only applies to criminal cases through 28 U.S.C. § 2461(c).

the representation necessary to challenge the Protective Order. DE 13, 18.[4]

On March 5, 2007, the Kaleys moved to vacate the Protective Order, so that they could access the remaining equity in their residence (approximately $500,000) and/or the CD to retain counsel-of-choice. DE 17. Because 21 U.S.C. § 853 authorizes an ex parte restraining order merely "upon the filing of an indictment," the Kaleys argued that the Fifth and Sixth Amendments entitled them to a prompt, pretrial adversarial hearing, at which they could challenge whether the PMDs were stolen. *Id.*[5] Pointing to the sentencing transcripts of Tarsia and Schmidt, counsel argued that the government was unlikely to convict the Kaleys at a trial because the government had no hospital-victim claiming an ownership interest in the PMDs. *Id.*

The prosecutors opposed the motion. DE 27. Citing *United States v. Bissell*, 866 F.2d 1343 (11th Cir.), *cert. denied*, 493 U.S. 876 (1989), they objected to any hearing that would require the government to reveal its evidence before trial. Alternatively, the government argued that at most the Kaleys could contest the *tracing* of assets to the alleged crimes but

---

[4] *See* Rule 88.7, Local Rules of the United States District Court for the Southern District of Florida ("Retained Criminal Defense Attorneys").

[5] The Kaleys also argued that the indictment was invalid because it was not signed by the foreperson of the grand jury. *See* Fed. R. Crim. P. 6(c) and 6(f). DE 17.

that the Kaleys were not entitled to even that limited hearing unless they first proved that they could not retain counsel by liquidating every asset worth over $500 (including Kerri's 401K retirement account and their childrens' college savings account). DE 27:9-10.

On April 6, 2007, Magistrate Judge James Hopkins convened a telephonic conference on the Kaleys' motion. DE 42, 43.[6] The prosecutors conceded that the government had traced only $140,000 in proceeds to the Kaleys' residence, a sum far short of the $2,195,635.28 demanded in the indictment. Pet. App. 107 (DE 82:2). The conference ended with Magistrate Judge Hopkins questioning the prosecutors' claim that they could restrain all of the Kaleys' assets in order to secure a potential $140,000 forfeiture. A hearing was then set for April 16, 2007.

E. The Superseding Indictment and a Second Round of Motions

On April 10, 2007, only two business days after the telephonic conference, the prosecutors obtained a superseding indictment, JA 48-65 (DE 44), which added a count of conspiracy to commit money laundering under 18 U.S.C. § 1956(h). JA 58. The superseding indictment demanded forfeiture under 18

---

[6] Due to an equipment malfunction, no transcript of this hearing could be produced by the court reporter. However, the representations made in the text were not challenged during the district court litigation.

U.S.C. § 982, a criminal forfeiture statute based on the new money laundering count. The new forfeiture allegation was not limited to traceable proceeds; it included a "facilitation" theory that listed the Kaleys' home and CD as forfeitable property, insofar as the home had been "involved in" the money laundering. JA 60-61.

The Kaleys renewed their challenge to the Protective Order, DE 53, and moved to bar the government's use of the new facilitation theory, arguing that it was vindictive. DE 52. The motion emphasized that the prosecutors had not sought restraining orders against co-defendant Gruenstrass or any of the sales representatives who had entered guilty pleas to the activities alleged in the indictment. DE 52:12, n.7.

F. The Evidentiary Hearing

On April 27, 2007, Magistrate Judge Hopkins convened a hearing limited to (1) an examination of the Kaleys' available assets and (2) whether they could establish that any of their assets were not traceable to the charged crimes. DE 99. The Kaleys established that $63,057.65 of the CD was from a source independent of the allegations in the indictment. The Kaleys demonstrated that liquidating all their unrestrained assets – primarily Kerri's 401K retirement account and their children's college funds – would cause the Kaleys to incur unrecoverable taxes and penalties of $183,500, Pet. App. 71, and net them $353,145.02 for living and legal expenses, of

which $75,000 was earmarked for the attorney working exclusively on drafting the pleadings challenging the Protective Order. DE 74:3-5; DE 99:17-18. Counsel gave a detailed estimate that fees for a trial of several weeks would total $400,000; out-of-pocket expenses were projected to be an additional $100,000. DE 99:20-24.[7]

When the Kaleys attempted to prove that the PMDs were not stolen, DE 99:94-96, Magistrate Judge Hopkins barred the testimony and denied the Kaleys' motions, finding "probable cause" based on the superseding indictment, as supplemented by an ex parte affidavit from an agent. Pet. App. 109.

Magistrate Judge Hopkins entered an Amended Protective Order explicitly listing the Kaleys' home and the CD as properties under restraint. JA 66-68 (DE 81). He found the restraint caused no unjust impingement on the Kaleys' Sixth Amendment right to counsel of choice, noting that "many competent attorneys work on the Criminal Justice Act panel where they charge $90 per hour." *Id.* at 110. Magistrate Judge Hopkins found that the Kaleys could retain other counsel for a lesser fee by liquidating their children's college savings plans and Kerri's 401K retirement account. *Id.*

---

[7] Neither the government nor the district court challenged the reasonableness of the estimated fees and expenses.

Magistrate Judge Hopkins also rejected the Kaleys' vindictiveness claim, holding that the prosecutors added the money laundering charges and a "facilitation" theory of forfeiture "to correct their mistakes pretrial in order to protect their legitimate interests." Pet. App. 109.

G. The District Court's Ruling

The district court adopted most of Magistrate Judge Hopkins's rulings, holding that the Kaleys were not entitled to any kind of post-seizure hearing under the Eleventh Circuit's decision in *Bissell*, which applied a "speedy trial" test from *Barker v. Wingo*, 407 U.S. 514 (1972). Pet. App. 94-104. The four-part test requires courts to consider: (1) the length of the delay between seizure and adjudication; (2) the reason for the delay; (3) whether the defendant has asserted his right; and (4) the prejudice to the defendant that the delay has caused. *Barker*, 407 U.S. at 530.

The district court released $63,057.65 because it was not traceable to the charges. Pet. App. 97. The district court stayed the arraignment and trial pending the Kaleys' interlocutory appeal. DE 140.

H. The Gruenstrass Trial

While the Kaleys were taking an interlocutory appeal, co-defendant Gruenstrass – whose assets were not frozen and who had retained counsel of choice – moved to continue her trial pending the

Kaleys' interlocutory appeal so all defendants could be tried together. DE 131. Despite its prior objection to having to reveal its case before the Kaleys' trial, the government insisted that Gruenstrass be severed and tried first without waiting for a decision on the Kaleys' appeal. JA 69-73 (DE 135). The district court granted the government's request and set Gruenstrass for trial.

In response to Gruenstrass's motion for a bill of particulars, the district court directed the government to "identify the owners of the prescription medical devices stolen, converted and taken by fraud as alleged in Counts 2-6" – the five substantive counts under § 2314, each based on a specific check reflecting payment for allegedly stolen PMDs. DE 157. Apparently still unable to find any hospitals that claimed their property had been stolen, the government reverted to the theory that it had disavowed before Judge Ryskamp during the Tarsia sentencing, announcing that for counts 2-6 the *sole* owner and "victim" was Gruenstrass's employer, "Ethicon, Inc." JA 74-7 (DE 159).[5] The government, however, did not identify how or under what legal theory Ethicon, Inc., could have owned products that had already been sold *unconditionally* to distributors and hospitals. Gruenstrass's counsel did not pursue the issue.

---

[5] Kerri was a sales representative for EES, while Gruenstrass was a sales representative for EES's sister entity, Ethicon, Inc.

Gruenstrass was tried between November 5-8, 2007. Most of the testimony was about the Kaleys.

Trial testimony established that EES was in the business of manufacturing and selling PMDs, particularly endosurgery products. DE 184:89. EES maintained an elaborate system for discouraging "returns" and "refunds" of PMDs previously sold by EES. Because the hospitals were not in the business of reselling their excess inventory of PMDs, the hospitals routinely *gave* unwanted PMDs to the EES sales representatives, who were at-will employees with no written contracts with EES. DE 185:377-78; DE 220-2:114; DE 196-3:10. Although EES did not expressly "authorize" the practice, "the company" and "everyone" knew about these arrangements but EES simply "would turn a blind eye" to it. DE 184:186-87, 210.

Admittedly, it was against company policy for sales representatives to take products out of the hospitals. DE 185:364, 369, 376, 393-98. But the policies in the company manuals were for "informational" purposes only and were not part of any employment contract. DE 185:370, 377-79, 403. The only document Ethicon made a sales representative sign was a non-compete agreement, *i.e.*, nothing about returning unwanted (and non-returnable) products. DE 185:377, 382.

The government relied on the testimony of several sales representatives, including Tarsia and Schmidt, who testified that the hospitals routinely gave the

excess PMDs to them; in turn, they gave the PMDs to Kerri for resale. DE 184:177, 180-82, 191, 197-98.[9]

John Keith Danks, another cooperating government witness who testified, was the "fence" for the alleged conspiracy. A former J&J employee himself, Danks set up shop in Florida under the corporate name F&S Medical, Inc., DE 184:250, and began buying the PMDs from sales representatives, especially Kerri, and reselling them to other wholesalers. DE 184:230-33.

All of Danks's records, including those of his company F&S Medical reflecting purchases from Kerri, were introduced against Gruenstrass to prove the conspiracy charge. Danks recorded the financial transactions using the Quickbooks accounting software and made no effort to conceal the payments to the Kaleys. DE 184:256.

FDA Special Agent Puhutsky testified that Danks's financial records were copious and clear – "from the records we saw, everything that he had dealt in was properly identified." DE 184:57. FDA consultant Thomas McGovern gave similar testimony and opined that the Kaleys' financial records were equally transparent. DE 185: 350-57. The Kaleys' accountant, called by the government, provided

---

[9] *See also* DE 184:138-75 (testimony of sales representative Roni Keskinyan); DE 186:720-52 (testimony of sales representative Maria McCaul).

similar testimony. DE 185: 299, 309, 314-15, 325-26, 328, 331-32.

The government rested its case without putting on testimony from a single "victim" claiming "ownership" of the PMDs. Even Agent Puhutsky had to admit that she did not "have any idea" who owned the PMDs or even whether they were stolen. DE 184:68. As Gruenstrass's counsel put it when he moved for a judgment of acquittal: "In effect, the Government is trying to sell a fraud case without a victim. . . . The problem with this case in a nutshell is the Government theorizes [Gruenstrass] cheated somebody some way, but they don't know who, and they're not too sure how. . . ." DE 185:438. Nor did the trial testimony establish any "money laundering" scheme designed to conceal the source or origin of the funds.

Consistent with its bill of particulars (but contrary to its representations to Judge Ryskamp and Judge Zloch), the government argued that the employers, not the hospitals, were the owner/victims. According to the government, the sales representatives' employers reacquired ownership through an "agency" principle at the moment the sales representatives accepted the PMDs from the hospital staff. DE 187:778.

The prosecutor produced no legal authority that this agency theory of acquiring property (*i.e.*, "constructive trust") is cognizable under § 2314. Indeed, under binding case law in the Eleventh Circuit, it is not. *See United States v. Goodrich*, 871 F.2d 1011,

1014-15 (11th Cir. 1989).[10] But Gruenstrass's counsel voiced no objections to the flawed theory of prosecution, and the district court denied Gruenstrass's motion for judgment of acquittal. DE 187:778.

Without the benefit of any legal briefing on the point, the district court accepted the government's theory that "ownership" automatically reverted back to the J&J companies when the hospitals relinquished their rights to excess inventory of PMDs. The court reasoned that because a sales representative was "in the position of a representative of the distributor," he or she "is holding the property for the benefit of the distributor, not for her own benefit. . . ." DE 185:435, 443-44.

In closing argument to the jury, the prosecutor eschewed any claim that the hospitals were the owners/victims. Although not a single witness testified that Ethicon was asserting any property interest in the PMDs, the prosecutor nevertheless pressed his flawed "constructive trust" theory: "Well, in point of fact, in Counts 1 to 6 the superior interest that was

---

[10] The majority of circuits are in accord. *See United States v. Miller*, 997 F.2d 1010 (2d Cir. 1993); *United States v. Walgren*, 885 F.2d 1417 (9th Cir. 1989); *United States v. Runnels*, 877 F.2d 481 (6th Cir. 1989); *United States v. Slay*, 858 F.2d 1310 (8th Cir. 1988); *United States v. Zauber*, 857 F.2d 137 (3d Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989); *United States v. Stack*, 853 F.2d 436 (6th Cir. 1988); *United States v. Shelton*, 848 F.2d 1485 (10th Cir. 1988); *United States v. Holzer*, 840 F.2d 1343 (7th Cir. 1988); *United States v. Ochs*, 842 F.2d 515 (1st Cir. 1988). *Contra United States v. Little*, 889 F.2d 1367 (5th Cir. 1989).

defeated from which the Defendant converted and took by fraud was *from her employer. We're not saying it was the hospital.*" DE 187:842-43 (emphasis added).

On November 8, 2007, the jury acquitted Gruenstrass of all counts in less than three hours. DE 187:875.

I. The Eleventh Circuit's Decision in *Kaley I*

The Kaleys filed a supplemental brief in the Eleventh Circuit concerning the implications of Gruenstrass's trial on the Kaleys' pending interlocutory appeal. The brief cited the Eleventh Circuit's *Goodrich* decision rejecting the government's flawed theory of prosecution. *See Kaley I*, 07-13010-HH (11th Cir. filed 1/15/08). The Kaleys argued that the Gruenstrass trial demonstrated that there was no conspiracy to commit money laundering, given the transparency of the financial transactions. The government did not respond to the supplemental brief.

In May 2009, the Eleventh Circuit issued its decision reversing the district court. Pet. App. 49-53. The majority opinion in *Kaley I* recognized that no other circuit had followed *Bissell* and openly acknowledged that "[i]f we were writing on a blank slate today we would be inclined, as Judge Tjoflat suggests in his special concurrence, to apply the test announced by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). . . ." Pet. App. 72. The majority nonetheless found that *Bissell* (which applied the four-part speedy trial test from *Barker v.*

Wingo) was still the law in the Eleventh Circuit. Pet. App. 57-58, 72. However, the majority remanded the case to the district court for a hearing to "re-weigh the *Barker* factors in order to calculate whether the Kaleys [were] entitled to a post-indictment pretrial evidentiary hearing." Pet. App. 72, 75.

Although the Kaleys had already had a hearing on "tracing" (resulting in the release of $63,057.65), the majority stated that the "purpose" of such a hearing "would not be to determine guilt or innocence but, rather, to determine the propriety of the seizure." Pet. App. 68. The burden of proof would be on the Kaleys, thus "sav[ing]" the government "from having to preview its entire case." *Id.* The majority did not address whether the district court could consider the evidence adduced during Gruenstrass's trial in "determining the propriety of the seizure." The majority did suggest that the hearing could mirror the "approach" approved by this Court in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), a prejudgment attachment civil case. Pet. App. 68.

In a concurring opinion, Judge Tjoflat expressed his view that *Bissell*'s reliance on the *Barker* test to define a defendant's due process rights was dicta. In his view, *Mathews* prescribed the proper test: (1) the private interest affected by the restraint, (2) the risk of erroneous deprivation through the procedures used, and (3) the probable value of additional procedural safeguards. Pet. App. 75-93. Judge Tjoflat found that the Kaleys' interests were enormous: "Delaying the due process hearing until trial will only temporarily

deprive the Kaleys of their property rights, but it will completely eviscerate their right to counsel of choice." Pet. App. 88-89. The risk of an erroneous deprivation likewise weighed in the Kaleys' favor, because a prosecutor's judgment, a grand jury's ex parte finding of probable cause, and an agent's ex parte affidavit were unlikely to protect a defendant "against an erroneous deprivation." Pet. App. 89-91. Judge Tjoflat also cited *Mitchell* as a guide to what type of hearing would be required in this setting. Pet. App. 91. At this hearing, the Kaleys could challenge "the merits," meaning that the burden would be on the Kaleys to "show that the Government did not have probable cause to restrain their assets." Pet. App. 93.

J. The District Court's Rulings on Remand

On remand, the district court re-weighed the *Barker/Bissell* factors and this time held that "the equities" favored the Kaleys. Pet. App. 47. At a hearing on July 29, 2010, the Kaleys advised the district court that they would not contest the nexus or "traceability" of the CD and house to the conduct which was the subject of the indictment. JA 107 (DE 233:10). Instead, they argued that the district court should modify the Amended Protective Order because it was now clear from the Gruenstrass trial that there was no probable cause, much less a substantial likelihood, to believe that any crimes were committed under either a hospital-as-owner or employer-as-owner theory. JA 106-22 (DE 233:15-31). To avert any claim of premature discovery, the Kaleys proposed to rely

exclusively on the Gruenstrass proceedings, Tarsia's sentencing transcript, EES's policy manuals and product brochures that precluded most product returns, and an affidavit from EES confirming that EES had never asserted any claim to the excess PMDs, much less sued or sought restitution from any sales representative for the purported thefts.[11] JA 102; *see also* DE 220.

The prosecutors continued to argue that the Kaleys had no right to contest any issue other than the nexus or "traceability" of the assets to the alleged criminal activity, regardless of the court's assessment of the viability of the government's theory of prosecution in light of the Gruenstrass trial. JA 130-43 (DE 233). In response to the evidence proffered by the Kaleys (including transcripts of the 4-day trial of Gruenstrass), the prosecutor relied exclusively on a non-compete agreement signed by Kerri. JA 103-04; DE 220-2:93-94. The district court then inquired:

> THE COURT: Let me ask you, assuming that I agree with the Defense's position . . . that you have to come forward with some

---

[11] The Kaleys' Hearing Memorandum, DE 196:43, demonstrated that, under the law of New York (where they took custody of the PMDs), a constructive trust cannot be recognized unless the employer formally asserts a superior interest in the proceeds. Moreover, the employer's failure to do so evinces the employer's consent to the employee's conduct. *See Berman v. Sugo LLC*, 580 F. Supp. 2d 191, 206 n.6 (S.D.N.Y. 2008) (citations omitted); *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 385-87, 122 N.E. 378 (1919) (Cardozo, J.).

> showing to convince me that you have a likelihood of success on the merits, is there anything in the record for me to be able to do that? Is there anything that satisfies that burden, assuming that I ultimately agree that that is what's required?
>
> [AUSA]: For these Defendants, because the other case [the Gruenstrass trial] was not focused on them, we would have to come [42] forward with more.

JA 138-39.

On October 25, 2010, the district court denied the Kaleys' motion to vacate, adopting the government's construction of *Kaley I* and *Bissell* that the *only* "relevant inquiry for this hearing is whether the seized assets are traceable to or involved in the alleged criminal conduct." Pet. App. 38-43. The order did not comment on any aspect of the Kaleys' factual or legal arguments. The district court stayed the case to allow the Kaleys to take a second interlocutory appeal.

K. The Eleventh Circuit's Decision in *Kaley II*

The Eleventh Circuit affirmed: "To the extent that *Kaley I* did not settle the issue, we now hold that at a pretrial, post-restraint hearing required under the *Bissell* test, the petitioner may not challenge the evidentiary support for the underlying charges." Pet. App. 15. The majority further held that even though the Kaleys had prevailed under the *Bissell/*

Barker test on remand from *Kaley I*, the *only* hearing that *Bissell* permitted was about traceability. Pet. App. 24. According to the *Kaley II* majority, the Kaleys' Sixth Amendment concerns could be satisfied through court-appointed counsel. Pet. App. 25.

Judge Edmondson wrote a concurring opinion in *Kaley II* that reads like a dissent. Expressing "deep doubts," he wrote: "If I were deciding the case alone, I expect I would reach a different result and write something largely in line with *United States v. Monsanto*, 924 F.2d 1186 (2d Cir. 1991) (en banc), and *United States v. E-Gold, Ltd.*, 521 F.3d 411 (D.C. Cir. 2008)." According to those cases, when the government seeks to impose a restraining order "add on to ordinary prosecution," due process requires an evidentiary hearing "about probable cause on both the predicate criminal offense and the forfeitability (traceability of assets to supposed crime) of the specified property." Pet. App. 33-34. The government would be free to "decide for itself what cards to show before the actual trial; the worst that will happen is that the pretrial restraint on property will not continue. . . " Pet. App. 34. Judge Edmondson ended his opinion by emphasizing that

> the potential for the dominating power of the Executive Branch to be misused by the arbitrary acts of prosecutors is real. The courts must be alert. To hear from the other side at a time when it matters (in this instance, before the criminal trial: a trial without counsel of the defendant's choice) is the basic and

> traditional way that American judges assure things are fair.

Pet. App. 36-37.

The Kaleys' petition for rehearing en banc was denied on July 17, 2012. Pet. App. 113-14. The district court then stayed the proceedings to permit the Kaleys to petition this Court for review. Pet. App. 116-17. The Kaleys timely filed their petition for a writ of certiorari on October 11, 2012, which this Court granted on March 18, 2013.

SUMMARY OF THE ARGUMENT

In *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617 (1989), this Court rejected a Fifth and Sixth Amendment challenge to 21 U.S.C. § 853, the federal statute that allows for the forfeiture of tainted funds used to pay counsel of choice. In a companion case, *United States v. Monsanto*, 491 U.S. 600 (1989), this Court approved the pretrial restraint of allegedly tainted funds needed to pay counsel of choice "based on a finding of probable cause to believe that the assets are forfeitable." *Id.* at 615. This Court explicitly left open the question – by then already dividing the circuits – "whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed." *Id.* at 615 n.10.

In the ensuing twenty-four years since this Court decided *Caplin & Drysdale* and *Monsanto*, the Courts

of Appeals have largely agreed that a criminal defendant is entitled to some type of pretrial adversarial hearing to challenge a restraint that effectively prevents the defendant from retaining counsel of choice. However, the Courts of Appeals have disagreed on the scope of such a pretrial hearing. Most courts have permitted a defendant to challenge the factual and legal bases for the restraint – *i.e.*, the grand jury's probable cause determination. *See* Certiorari Petition at 18-29. Other courts, including the Eleventh Circuit, have required the trial courts to assume the validity of the grand jury's finding and limited the inquiry to whether the restrained asset is traceable to the charged conduct. *Id.*

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'" upon the deprivation of liberty or property. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). This Court's precedents under the *Mathews* rubric permit the party affected by the deprivation to challenge its factual and legal bases, either before the deprivation or at a hearing set promptly thereafter.

Eschewing the *Mathews* line of cases, the Eleventh Circuit held that the Kaleys were not entitled to challenge pretrial the grand jury's finding of probable cause, no matter how demonstrably flawed, even though the restraint of their assets would deprive them of their counsel of choice at trial. Instead, the Eleventh Circuit permitted the Kaleys to challenge

only the traceability of the restrained assets to the charged conduct. Pet. App. 15; *Kaley II*, 677 F.3d 1316 (11th Cir. 2012).

None of this Court's precedents limits the scope of such hearings to traceability. To the contrary,

> where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which ***some showing of the probable validity of the deprivation must be made***.

C.I.R. v. Shapiro, 424 U.S. 614, 629 (1976) (emphasis added).

The rule thus applied by the Eleventh Circuit allows a grand jury's ex parte and untested finding of "probable cause" to financially handicap a criminal defendant's ability to mount a defense to the charges that threaten the defendant's liberty. That harsh result cannot be correct.

ARGUMENT

Due Process Requires a Pretrial, Adversarial Hearing When an Ex Parte Protective Order Restrains the Assets a Criminal Defendant Needs to Retain Counsel of Choice

When the government seeks a pre-indictment protective order under 21 U.S.C. § 853, the statute provides for a hearing at which the court must determine whether "there is a substantial probability that the United States will prevail on the issue of forfeiture." 21 U.S.C. § 853(e)(1)(B)(i). However, if the government first obtains an indictment, a restraining order may be entered ex parte, and no hearing is prescribed by the statute. 21 U.S.C. § 853(e)(1)(A).

The absence of a prompt, post-restraint, adversarial hearing violates the Due Process Clause of the Fifth Amendment when the restraint effectively prevents a criminal defendant from retaining counsel of choice under the Sixth Amendment. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006). Petitioners submit that the Fifth and Sixth Amendments require a hearing at which the government must establish a substantial probability that it will prevail on the issue of forfeiture.

To establish a procedural due process violation, the Kaleys must show that: (1) the government has deprived them of a protected property interest, and (2) the deprivation occurred without adequate procedural safeguards. *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961). The first

element is undisputed. A protective order is prohibiting the Kaleys from using their money and the equity in their home for legal expenses. While the protective order "does not divest definitively the ownership rights" of the Kaleys, "it certainly does remove those assets from [their] immediate control and therefore divests [them] of a significant property interest." *United States v. Moya-Gomez*, 860 F.2d 706, 725-26 (7th Cir. 1988). A protective order that deprives citizens of their "interest in continued possession and use" of their property triggers due process protections. *Fuentes v. Shevin*, 407 U.S. 67, 84, 86 (1972) (citations omitted).

A. *Mathews v. Eldridge*, 424 U.S. 319 (1976), Provides the Correct Framework to Determine Whether Procedural Safeguards are Adequate

This Court has, with rare exceptions, relied upon the "general approach" of *Mathews* "for testing challenged [government] procedures under a due process claim." *Parham v. J.R.*, 442 U.S. 584, 599 (1979). *See, e.g.*, *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (right to counsel in civil contempt proceeding); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007) (punitive damage awards); *Wilkinson v. Austin*, 545 U.S. 209 (2005) (transfers to supermax prisons); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (hearings for an alleged "enemy combatant"); *City of Los Angeles v. David*, 538 U.S. 715 (2003) (seizure of a car for parking violations); *Zinermon v. Burch*, 494 U.S. 113 (1990) (involuntary

commitment to mental health facility); *F.D.I.C. v. Mallen*, 486 U.S. 230 (1988) (a banker's right to a post-suspension hearing); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (statutory limitations on attorneys' fees); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (termination of a public employee with a for-cause employment right); *Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (termination of public utility service); *Gilbert v. Homar*, 520 U.S. 924 (1977) (suspension of state employee); *Fusari v. Steinberg*, 419 U.S. 379 (1975) (termination of unemployment benefits); *Bell v. Burson*, 402 U.S. 535 (1971) (license suspension proceedings); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (corporal punishment in schools); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of public assistance benefits).[12]

---

[12] There are cases in which the Court has declined to apply *Mathews*, but they did not involve the timing and scope of the hearings required when the government interferes with property rights. *See, e.g., Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005) (challenge to adequacy of a public education program); *Dusenbery v. United States*, 534 U.S. 161 (2002) (challenge to adequacy of notice of a cash seizure); *Weiss v. United States*, 510 U.S. 163 (1994) (challenge to lack of fixed terms for military judges in a court martial proceeding); *Medina v. California*, 505 U.S. 437 (1992) (challenge to the procedures of a competency hearing); *Atkins v. Parker*, 472 U.S. 115 (1985) (challenge to adequacy of notice given for change in welfare benefits); *Black v. Romano*, 471 U.S. 606 (1985) (challenge to the procedures in a probation revocation hearing).

To determine the process due in any particular setting, the *Mathews* test considers three factors:

> First, ***the private interest*** that will be affected by the official action; second, ***the risk of an erroneous deprivation*** of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, ***the Government's interest***, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335 (emphasis added); *accord United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993).

While this Court has not previously addressed what interim procedural safeguards are required when *the government* seeks a pre-judgment order restraining a defendant's assets until trial, the Court has on several occasions addressed the parallel issue of what safeguards satisfy due process when *a private civil litigant* seeks a pre-judgment attachment or garnishment order pending the final outcome of a civil dispute. On each occasion, the Court has used *Mathews* or a *Mathews*-like balancing test, not *Barker v. Wingo*, 407 U.S. 514 (1972), to evaluate whether the deprivation violates due process. The Court has consistently required either a pre-deprivation or prompt post-deprivation hearing for the aggrieved party. In none of these cases has the contemplated hearing been limited to an inquiry regarding traceability.

1. *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969)

In a case predating *Mathews*, this Court in *Sniadach* invalidated a Wisconsin pre-judgment garnishment statute that allowed an employer to freeze up to half of an employee's income without prior notice or hearing. 395 U.S. at 338 n.1. Until trial on the merits, the employee was "deprived of his enjoyment of earned wages without any opportunity to be heard ***and to tender any defense he may have***, whether it be fraud or otherwise." *Id.* at 339 (emphasis added). Finding that the "taking" of a wage earner's important source of income was "obvious, it needs no extended argument to conclude that absent notice and a prior hearing [citation omitted] this prejudgment garnishment procedure violates the fundamental principles of due process." *Id.* at 342.

2. *Fuentes v. Shevin*, 407 U.S. 67 (1972)

Three years later, in *Fuentes* this Court found Florida's and Pennsylvania's replevin statutes unconstitutional for similar reasons. The Florida case involved the purchase of a stove and stereo on an installment contract under which the vendor retained title to the goods until payments were completed. *Fuentes*, 407 U.S. at 70. After making payments for more than a year, and with only $200 owed to the vendor, the consumer (Ms. Fuentes) stopped making payments. *Id.* The vendor filed suit and obtained a writ of replevin ordering the sheriff to seize the stove

and stereo, which he did. *Id.* at 71. The Pennsylvania case involved consumers who likewise purchased household goods on installment, but the goods were replevied when the consumers fell behind on their payments. *Id.* at 71-72.

Neither replevin statute required notice or opportunity for hearing before permitting ex parte seizures. Under the Florida statute, the creditor "had only to fill in the blanks on the appropriate form document and submit them to the clerk of the small-claims court." *Id.* at 70-71. The clerk would issue the writ based on nothing but the "bare assertion" of the creditor. *Id.* at 71-74. The only procedural protection was that the party post a security bond and file a complaint for repossession. *Id.* at 74. After the property was seized, the only hearing provided the consumer/debtor was the ultimate trial on the vendor/creditor's complaint. Pennsylvania's statute was similar but did not require the filing of a complaint. *Id.* at 77. To obtain a hearing, the debtor had to file a complaint himself. *Id.* at 78. This Court found that both statutory schemes violated due process, expressing skepticism over "secret, one-sided determination of facts decisive of rights." *Id.* at 81 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring)).

Significantly, the consumers "lacked full legal title to the replevied goods." *Id.* at 86.

> But even assuming that the appellants had fallen behind in their installment payments,

> and that they had no other valid defenses, that is immaterial here. The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. 'To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merit.' It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods.

Id. at 87 (citation omitted). The Court left open the "nature and form" of the interim hearing but cautioned that "to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test." *Id.* at 96-97.

The hearing contemplated by the Court was not limited to tracing – *i.e.*, whether the Florida sheriff had mistakenly seized from Ms. Fuentes the wrong stove and stereo. Rather, the Court emphasized that the "only" type of hearings that would satisfy due process are those "'aimed at establishing the validity, or at least ***the probable validity, of the underlying claim*** against the alleged debtor. . . .'" *Id.* at 97 (emphasis added) (quoting *Sniadach*, 395 U.S. at 343 (Harlan, J., concurring)); *see also id.* at 97 n.32 (reiterating that at the hearing "the applicant for a writ

must establish the probable validity of his claim for repossession").

3. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974)

In *Mitchell*, a buyer defaulted in paying the balance of the purchase price of various appliances. The creditor obtained ex parte a "writ of sequestration" for the recovery of the goods under a Louisiana statute that required only a sworn affidavit and the posting of a bond but no pre-deprivation hearing. After the appliances were seized, the buyer/debtor moved to dissolve the writ, arguing that he had a due process right to a pre-seizure hearing. 416 U.S. at 602-03.

In upholding the statute, the Court emphasized four points. First, *Mitchell* was "not a case where the property sequestered by the court is exclusively the property of the defendant debtor . . . both the seller and buyer had current, real interests in the property." 416 U.S. at 604. Second, the verified petition was submitted to a judge, not just a clerk. *Id.* at 605-06, 616.[13] Third, the Louisiana statute entitled the debtor to an interim hearing at which he could "put the

---

[13] Implicit in the importance of requiring the involvement of a neutral judicial officer is that the officer has discretion to deny the writ. *See Johnson v. American Credit Co.*, 581 F.2d 526, 534 (5th Cir. 1978) (finding that a neutral magistrate with discretion to deny the writ of attachment is an essential constitutional safeguard).

creditor to his proof" by requiring the creditor "***to establish . . . the probability that his case will succeed***. . . ." *Id.* at 609 (emphasis added).[14] Fourth, if the creditor failed to meet his burden of proof, the judge could "assess damages in favor of the debtor, including attorney's fees." *Id.* at 606, 617.

The Court thus approved the pre-hearing seizure authorized by the Louisiana statute because the procedural safeguards in place – including a prompt, post-deprivation hearing not limited to a tracing inquiry – provided a "constitutional accommodation of the conflicting interests of the parties." *Id.* at 607.

4. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975)

Di-Chem involved a suit to recover the purchase price for goods sold and delivered to a buyer. As permitted under Georgia law, the creditor filed an affidavit for garnishment of the debtor's bank account along with its complaint in the underlying action. 419 U.S. at 601-04. The Court had little trouble finding the Georgia statute invalid "for the same reasons" as the statutes in *Fuentes*. *Id.* at 606. The Court added that the Georgia statute also contained "none of the saving characteristics" of the statute in *Mitchell*, like

---

[14] *Mitchell* was mis-cited by both the majority and concurring opinions in *Kaley I* for the proposition that the Kaleys should bear the burden of proof. *See* Certiorari Petition at 32-33 & n.8.

"an immediate hearing after seizure and to dissolution of the writ absent ***proof by the creditor of the grounds on which the writ was issued.***" *Id.* (emphasis added). The Court was troubled by the absence of "an early hearing at which the creditor would be required to demonstrate ***at least probable cause for the garnishment.***" *Id.* at 607 (emphasis added).

5. *Connecticut v. Doehr*, 501 U.S. 1 (1991)

The Court synthesized this series of precedents in *Doehr*. Plaintiff sought a $75,000 attachment on the defendant Doehr's home as security for a tort suit alleging assault and battery. 501 U.S. at 5. Connecticut allowed attachment of real property without notice or prior hearing or bond "upon verification by oath of the plaintiff . . . that there is probable cause to sustain the validity of the plaintiff's claim." *Id.* (citation omitted). Based solely on the affidavit, the state court judge could find "probable cause" and order the attachment. *Id.* at 7. Defendant received neither service of the complaint in the underlying action nor notice of attachment until after the sheriff attached the property. *Id.*

Like the Louisiana statute in *Mitchell*, the Connecticut statute granted the defendant the right to an expeditious post-attachment adversary hearing before a judge "to claim that no probable cause existed to sustain the claim" and granted double damages for actions started without probable cause. *Id.* at 7, 15. Instead of pursuing that remedy, the defendant

filed suit in federal court, claiming that the statute violated due process. After reviewing its prior attachment and garnishment cases in light of *Mathews*, the Court found that the statute violated due process, focusing most of its attention on the "risk of erroneous deprivation" factor, which the Court found was "substantial." *Id.* at 12.[15]

Although the statute used the term "probable cause," the statute later defined the plaintiff's burden as proving the "likelihood that judgment will be rendered in the matter in favor of the plaintiff." *Id.* at 13 (quotations omitted). The parties presented three potential interpretations of this burden of proof: (1) "the objective likelihood of the suit's success"; (2) the plaintiff had "a subjective good faith belief that the suit will succeed"; or (3) stating enough facts in the complaint "to survive a motion to dismiss." *Id.* at 13. The Court found that the risk of error under the second and third potential definitions would be too great to satisfy due process: "It is self-evident that the judge could make no realistic assessment concerning the likelihood of an action's success based upon these one-sided, self-serving, and conclusory submissions." *Id.* at 13-14.

---

[15] The Court found that the defendant had a sufficient interest in the assets to warrant due process protection even though the impairment was only partial, comparing the attachment to a lien. *Doehr*, 501 U.S. at 12.

Although the statute in *Mitchell* had been salvaged largely because it included a post-deprivation hearing, the Court in *Doehr* believed that the risk of error in *Mitchell* was minimized by the fact that the statute applied to "uncomplicated matters that lent themselves to documentary proof." *Id.* at 15 (citation omitted). In addition, the Court noted that unlike the debtor-creditor paradigm, the plaintiff in *Doehr* "had no existing interest in [defendant]'s real estate when he sought the attachment" and that his only interest was "to ensure the availability of assets to satisfy his judgment if he prevailed on the merits of his action." *Id.* at 16. Finding that the State's interest in protecting the rights of tort victims was "*de minimis*," at least absent exigent circumstances, a unanimous Court found the statute unconstitutional. *Id.*

6. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993)

This Court applied the *Mathews* test in *Good* to address the timing and scope of a property owner's due process rights when the government seized the owner's home pending the outcome of a civil forfeiture proceeding. The Court in *Good* began by emphasizing that the amendments to the Constitution are distinct and that "the applicability of one" does not "preempt[] the guarantees of another." 510 U.S. at 49 (citation omitted). The Court then rejected the government's reliance on *Gerstein v. Pugh*, 420 U.S. 103 (1975), for the assertion "that when property is seized for forfeiture, the Fourth Amendment provides

the full measure of process due under the Fifth [Amendment]." *Id.* at 50. Nor did the Court use (or even mention) the Sixth Amendment-based *Barker* test.[16]

Because the issue in *Good* involved interim procedural requirements, the Court deemed the Fifth Amendment the most applicable constitutional provision. *Good*, 510 U.S. at 48, 53. The Court compared the seizure of a home to the attachment claims in *Fuentes* and *Doehr*, holding that the claimant was entitled to a hearing in advance of trial (and in advance of the seizure as well). *Good*, 510 U.S. at 54.

Significantly, the claimant had already pled guilty to a drug offense based on the seizure of marijuana and other contraband from his home. *Id.* at 46. Thereafter, the government, operating ex parte, seized and sought to forfeit the home civilly. *Id.* Despite the claimant's criminal conviction, the Court still held that he was entitled to a *pre*-seizure adversarial hearing, finding that the ex parte proceeding used to seize the home "affords little or no protection to the innocent owner" because in such a proceeding the magistrate judge "need determine only that there is probable cause to believe" that the property was

---

[16] The remedies for Fourth and Sixth Amendment violations – suppression of evidence and dismissal of indictments, respectively – have a direct impact on the final outcome of the underlying controversies. *See generally Barker*, 407 U.S. at 522 (noting the "unsatisfactorily severe remedy of dismissal of the indictment when the speedy trial right has been deprived").

used to facilitate the underlying drug crimes. *Id.* at 55.

The Court was also critical of the fact that at the ex parte proceeding, the government was "not required to offer any evidence on the question of innocent ownership or other potential defenses a claimant might have." *Id.* Indeed, the Court found the use of ex parte proceedings to be inherently unreliable, harking back to the oft-quoted criticism of "secret, one-sided determination of facts." *Id.* (quoting *McGrath*, 341 U.S. at 170-72 (Frankfurter, J., concurring)). *See also Fuentes*, 407 U.S. at 81. The Court also found "an adversary hearing" to be particularly important because the government had "a direct pecuniary interest in the outcome of the proceeding." *Good*, 510 U.S. at 56.

Finally, the Court expressed concern over the time it would take for a final adjudication of the case, recognizing that a claimant might

> not receive an adversary hearing until many months after the seizure. And even if the ultimate judicial decision is that the claimant was an innocent owner, or that the Government lacked probable cause, this determination, coming months after the seizure, "would not cure the temporary deprivation that an earlier hearing might have prevented."

Id. (quoting *Doehr*, 501 U.S. at 15).

B. *Barker v. Wingo*, 407 U.S. 514 (1972), Provides the Appropriate Framework Only When a Party Seeks Dismissal of the Government's Case

Rather than apply this line of Fifth Amendment cases to evaluate the adequacy of the procedural safeguards following an ex parte restraint of property, the Eleventh Circuit instead applied the Sixth Amendment framework announced in *Barker*. Neither of the forfeiture cases in which this Court has employed the *Barker* test involved the question of whether a claimant or defendant is entitled to some *interim* relief pending a final adjudication. *See United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 (1983); *United States v. Von Neumann*, 474 U.S. 242 (1986). Rather, those cases involved challenges to the delay between the seizure and the ultimate trial on the merits. In both cases, the claimants sought the outright dismissal of forfeiture actions due to delays – in *$8,850*, the delay between a seizure and the filing of a forfeiture complaint, and in *Von Neumann*, the delay between the filing of a petition for remission and a final ruling on that petition. *See $8,850*, 461 U.S. at 556; *Von Neumann*, 474 U.S. at 243.

In the course of litigating *$8,850* before this Court, the government itself recognized that whether interim relief is required posed a distinct issue from whether the length of the delay from the restraint or seizure until a final adjudication on ownership was too long to permit the forfeiture at all. Thus, in its

Brief in *$8,850*, the government acknowledged that the civil forfeiture process involves "three stages of potentially improper deprivation of an individual's property interest: (1) the actual seizure of the property by the government; (2) the retention of the property until legal title thereto is finally established by the forfeiture action or other means; and (3) the judgment declaring the property forfeited and perfecting title in the United States." Brief for the United States, *United States v. $8,850*, No. 81-1062 (June 28, 1982), 1982 U.S. S.Ct. Briefs LEXIS 530 at 38-39. Addressing the third stage, the government argued that the delay between the initial deprivation and the final adjudication would only require "the extreme remedy of dismissal" if the property owner could satisfy the rigorous speedy trial test in *Barker*. *Id.* at 36.

The government also recognized, however, that the forfeiture trial did not fully protect the claimant's rights because "if the original taking was wrongful, then during the period prior to the [final forfeiture trial] and eventual return of the property, the claimant has been improperly denied the rightful use of his property." *Id.* at 39. The government nonetheless argued that the claimant's property rights during the "retention" phase did not justify creating a "constitutional requirement for prompt post-seizure filing of civil forfeiture actions" because a claimant had "other remedies that fully suffice to reduce to an acceptable level the risk of an erroneous deprivation of property arising from a seizure." *Id.* at 40-41, 58-59.

In particular, the government argued that "[a] person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property" under then-Rule 41(e) of the Federal Rules of Criminal Procedure (now Rule 41(g)).[17] *Id.* at 59. Under then-Rule 41(e), the government assured the Court, "a party challenging the seizure of his property for forfeiture can ordinarily obtain a judicial determination of the existence of probable cause for its seizure." *Id.*; *see also id.* at 60 (arguing that "the availability of the Rule 41(e) remedy clearly affords adequate process to guard against unjustified seizures and to root out most instances in which seized property cannot ultimately be shown to be forfeitable"); *id.* at 65 (arguing that "[s]ince other post-seizure process is available to test the initial lawfulness of the seizure . . . , decisions like *Fuentes* provide little support for" the creation of a prompt post-deprivation hearing under the Due Process Clause).[18]

The government also emphasized in *$8,850* that the creation of a due process-based interim hearing

---

[17] Fed. R. Crim. P. 41(e) was re-numbered Fed. R. Crim. P. 41(g) in 2002.

[18] In an *amicus* brief filed in *Alvarez v. Smith*, 558 U.S. 87 (2009) (dismissed as moot), the Solicitor General likewise wrote: "When, on the facts of a particular case, an individual claimant faces genuine hardship from delay, she may be entitled, under *$8,850*, to additional redress." Brief for the United States as Amicus Curiae Supporting Petitioner, *Alvarez v. Smith*, 558 U.S. 87 (2009) (No. 08-351), 2009 WL 1397196 at *7. *See also* Certiorari Petition at 36-37.

was unnecessary because the claimant did *not* contend that the "ability to defend" the forfeiture action was affected by the interim loss of resources. *Id.* at 55; *see also id.* at 53 ("It is clear beyond dispute that [the claimant] was in no way prejudiced by the government's delay in filing its civil forfeiture action . . . ."). This Court made the same point in both *Von Neumann* and *$8,850*. *See Von Neumann*, 474 U.S. at 250-51; *$8,850*, 461 U.S. at 569.

Criminal forfeitures involve the same three stages: (1) the initial imposition of a restraining order, (2) the retention of the restraints until trial, and (3) the criminal trial and final forfeiture adjudication. Once the government obtains an indictment and an asset freeze, there is no vehicle equivalent to a Rule 41 motion for return of property through which a defendant may obtain "a judicial determination of the existence of probable cause," 1982 U.S. S.Ct. Briefs LEXIS 530 at 59, for the restraints prior to trial. Hence, unless the Court requires an interim hearing as a matter of due process, there will be no alternative remedy available at the retention phase "to reduce to an acceptable level the risk of an erroneous deprivation of property." *See id.*

The guiding principle that emerges from this Court's precedents is that the due process analysis changes depending on the nature of the relief sought. Where the issue is entirely procedural, *Mathews* provides the proper framework. Only where the property owner attempts to avoid a judgment on the merits by demanding dismissal of the government's

claim is the speedy trial framework the more appropriate one. Because the Kaleys are seeking modification of the protective order, not outright dismissal of the underlying charges, their due process claim should be governed by *Mathews*. Moreover, unlike the claimants in *$8,850* and *Von Neumann*, the Kaleys' "ability to defend" the underlying criminal and forfeiture proceedings is adversely affected by the denial of interim relief. Thus, *Mathews* is the appropriate test to apply in this instance.

Every circuit, save the Eleventh, has used *Mathews* to address the procedural due process question.[19] Similarly, even without the Sixth Amendment gloss, most courts have applied *Mathews*, not *Barker*, in the civil forfeiture context. *See, e.g.*, *Krimstock v. Kelly*, 306 F.3d 40, 68 (2d Cir. 2002) (Sotomayor, J.) (distinguishing *$8,850* and *Von Neumann*, recognizing that the Constitution "distinguishes between the need for prompt review of the propriety of continued government custody, on the one hand, and delays in rendering final judgment, on the other"); *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008) (applying *Mathews*, not *$8,850*, to conclude that due process required some sort of

---

[19] The Kaleys' Certiorari Petition at 18-29 sets forth the various positions taken by the circuit courts.

pre-forfeiture mechanism to test the validity of retaining an owner's property).[20]

C. When the Right to Counsel of Choice is at Stake, the *Mathews* Test Requires a Hearing at Which Defendants May Challenge Probable Cause

The factors that weighed so heavily in requiring at least prompt post-deprivation adversarial hearings in civil attachment and forfeiture proceedings are present here. But unlike those precedents, in this case, the impact of the restraints implicates other constitutional rights.

1. The Kaleys' Private Interests

As the review of the Court's civil attachment cases underscores, an examination of the parties' competing interests begins with property law principles. The Kaleys have had long-standing title to their home and CD. The "right to maintain control over [one's] home, and to be free from governmental interference, is a private interest of historic and continuing importance" and includes "the right to

---

[20] In 2009, the Court granted a petition for writ of certiorari in *Smith* "to determine whether Illinois law provides a sufficiently speedy opportunity for an individual, whose car or cash police have seized without a warrant, to contest the lawfulness of the seizure." *Alvarez v. Smith*, 558 U.S. 87, 89 (2009). After full briefing and oral argument, the Court held that the issue had become moot. *Id.*

unrestricted use and enjoyment" of that property. *Good*, 510 U.S. at 53-54 (citations omitted).

The government's regulatory interest in ensuring the availability of funds to satisfy a future forfeiture judgment does not rise to the level of a competing *property* right. Unlike the claimant in *Good*, who had already been convicted of the crimes upon which the forfeiture case and seizure were predicated, the Kaleys have not been convicted of anything. Unless and until they are, the CD and home are their property and no one else's. *See United States v. A Parcel of Land (92 Buena Vista Avenue)*, 507 U.S. 111, 123-24, 127 (1993); *see also id.* at 134 (Scalia, J., concurring in the judgment) (stating that a person holding legal title to an asset is "genuinely the 'owner' . . . prior to the decree of forfeiture. . . .").[21]

Therefore, this is not a case, like *Mitchell*, where *both* the debtor and creditor "had current, real interests in the property." *Mitchell*, 416 U.S. at 604. Rather, like the plaintiff in *Doehr*, the government has "no existing interest" in the Kaleys' property. *Doehr*, 501 U.S. at 16.

In *Good* and the Court's attachment cases, the deprivations did not prejudice the property owners' abilities to litigate the underlying controversies. In

---

[21] In *Caplin & Drysdale*, the attorneys also did not seek access to the defendant's funds until *after* conviction, which vested the government with title to the property by that point in time. 491 U.S. at 627, 628.

contrast, here the collateral consequences are enormous. The Kaleys will not be spending the unfrozen funds "on wine, women, and song." *United States v. Ginsburg*, 773 F.2d 798, 802 (7th Cir. 1985). The money is needed to retain counsel of choice and pay related litigation expenses to defend this case.

The Sixth Amendment right to counsel encompasses more than the right to effective representation. It also includes the right to counsel of one's choice. *Gonzalez-Lopez*, 548 U.S. at 148; *Wheat v. United States*, 486 U.S. 153, 159 (1988). "Lawyers are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues." *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979).

> Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice – which is the right to a particular lawyer regardless of comparative effectiveness – with the right to effective counsel – which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

Gonzalez-Lopez, 548 U.S. at 148.

Delaying the due process hearing until trial, although only temporarily depriving the Kaleys of their property rights, "will completely eviscerate their

right to counsel of choice." *Kaley I*, 579 F.3d at 1266 (Tjoflat, J., concurring). "While the [Sixth Amendment] deprivation is nominally temporary, it is in that respect effectively a permanent one. The defendant needs the attorney *now* if the attorney is to do him any good." *United States v. E-Gold, Ltd.*, 521 F.3d 411, 417-18 (D.C. Cir. 2008) (citations and quotations omitted). *Cf. Shapiro*, 424 U.S. at 629 ("Our conclusion . . . is fortified by the fact that construing the Act to permit the Government to seize and hold property on the mere good-faith allegation of an unpaid tax would raise serious constitutional problems in cases, such as this one, where it is asserted that seizure of assets pursuant to a jeopardy assessment is causing irreparable injury [by restraining funds defendant needs to post bail]").

The prejudice to the Kaleys is exacerbated because "[t]he restraint of assets . . . prohibits the Kaleys not only from retaining their counsel of choice, but also from retaining the experienced attorneys who have represented them since the grand jury investigation began in January, 2005." *Kaley I*, Pet. App. 71. The resources the Kaleys have *already* expended on counsel during the two-year grand jury investigation will have been largely wasted. New counsel would be forced to learn the case from scratch, giving the prosecutors an additional advantage.

The restraint also limits how much of their own money the Kaleys have available to retain investigators, experts, consultants and other para-professionals,

thus interfering with "the guarantee afforded by the Fifth Amendment Due Process Clause of a 'balance of forces' between the accused and the Government." *Monsanto*, 491 U.S. at 614. Toward that end, the Kaleys had set aside $100,000 for such litigation-related expenses.

The Kaleys' interest in the restrained assets is more compelling than the interests of the civil defendants in the Court's civil attachment and forfeiture cases. Here the money is earmarked for legal expenses to defend not only against the money laundering charge that purports to justify the restraint, but also against other charges joined in the same indictment that do not permit such a broad restraint.[22] A conviction may result not only in the forfeiture of the Kaleys' property but the forfeiture of their liberty as well. Freedom from the "loss of personal liberty through imprisonment . . . lies 'at the core of the liberty protected by the Due Process Clause.'" *Turner*, 131 S. Ct. at 2518. The stakes could not be much higher.

---

[22] The transportation of stolen goods charges (counts 2-6), 18 U.S.C. § 2314, would only support a restraint of $140,000. Pet. App. 50-51 n.3. The obstruction of justice charge (count 8), 18 U.S.C. § 1512(b)(3) and 2, does not authorize any restraint at all. JA 59.

2. The Risk of Erroneous Deprivation

Where "the Government has a direct pecuniary interest in the outcome of the proceeding," the risk of erroneous deprivation is significant. *Good*, 510 U.S. at 56 (citing *Harmelin v. Michigan*, 501 U.S. 957, 979, n.9 (1991) (opinion of Scalia, J.) ("It makes sense to scrutinize government action more closely when the State stands to benefit.")). As this Court noted in *Good*, in 1990 the Attorney General distributed a memorandum to all U.S. Attorneys encouraging them "'to significantly increase production'" – *i.e.*, "the volume of forfeitures in order to meet the Department of Justice's annual budget target." *Id.* at 56 n.2 (citation omitted). The result of the Department's efforts has been staggering. *See* Certiorari Petition at 31; Brief of the Cato Institute as Amicus Curiae at 11 and nn.3 & 4.

Procedures are necessary, therefore, "to ensure the requisite neutrality that must inform all government decision-making." *Good*, 510 U.S. at 55. *See also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980) (Due process would be violated if, in a civil enforcement scheme, there is "a realistic possibility that the [prosecutor's] judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts."); *United States v. Funds Held ex rel. Wetterer*, 210 F.3d 96, 110 (2d Cir. 2000) (noting the "potential for abuse" and "corrupting incentives" of a system where the Department of Justice "conceives the jurisdiction and ground for seizures,

and executes them, [and] also absorbs their proceeds. . . .").

In both *Fuentes* and *Doehr*, this Court found the risk of error to be intolerable when decisions about property rights are made based on one-sided presentations and ex parte proceedings. *See Doehr*, 501 U.S. at 14; *Fuentes*, 401 U.S. at 81. Indeed, the Court in *Doehr* found it "self-evident" that the use of such proceedings would not comport with due process. "The value of a judicial proceeding . . . is substantially diluted" where a court proceeds ex parte because the court "does not have available the fundamental instrument of judicial judgment: an adversary proceeding in which both parties participate." *Carroll v. Princess Anne*, 393 U.S. 175, 183 (1968).

Thus, the government's contention below that a grand jury's finding of "probable cause" is a sufficient procedural safeguard strains credulity. Historically, the Court has viewed the grand jury "as a barrier to reckless or unfounded charges," *United States v. Mandujano,* 425 U.S. 564, 571 (1976), and the "primary security to the innocent against hasty, malicious and oppressive persecution." *Wood v. Georgia*, 370 U.S. 375, 390 (1962). But the federal grand jury's potency "as a check on prosecutorial power," *United States v. Cotton*, 535 U.S. 625, 634 (2002), has been systematically diluted to the point where "[m]ost knowledgeable observers would describe the federal grand jury more as a handmaiden of the prosecutor than a bulwark of constitutional liberty; to quote the classic vignette, the grand jury is little more than a

rubber stamp that would 'indict a ham sandwich' if the prosecutor asked." Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 Am. Crim. L. Rev. 1, 2 (Winter 2004) (citation omitted). Today, "[t]he grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything. . . ." William J. Campbell, *Eliminate the Grand Jury*, 64 J. Crim. L. & Criminology 174, 174 (1973).

Grand jury proceedings are run entirely by prosecutors, who author the indictments, decide what witnesses to call and what evidence to introduce. *See generally United States v. Sells Engineering, Inc.*, 463 U.S. 418, 430 (1983). All of this is, of course, done in proceedings that are held ex parte with no evidentiary limitations and no judge to guide the grand jurors. A grand jury may lawfully indict based on double or even triple hearsay, *Costello v. United States*, 350 U.S. 359, 363 (1956), on "tips, rumors, evidence offered by the prosecutor, or their own personal knowledge," *United States v. Dionisio*, 410 U.S. 1, 15 (1973), and on illegally seized and unconstitutionally obtained evidence. *United States v. Calandra*, 414 U.S. 338, 349-52 (1974).

Conversely, the target of a grand jury investigation has no right to testify or even appear. *See* Fed. R. Crim. P. 6(d)(1). The government is under no duty to bring exculpatory evidence to the attention of the grand jury, *United States v. Williams*, 504 U.S. 36 (1992), or allow counsel for the target of the investigation to be present, much less cross-examine witnesses.

Mandujano, 425 U.S. at 581; *Conn v. Gabbert*, 526 U.S. 286, 292 (1999). And, if for some reason the prosecutor cannot convince one grand jury to return an indictment, the prosecutor can start over before another and another until one is finally convinced to indict. *See United States v. Thompson*, 251 U.S. 407, 413 (1920). Claims of prosecutorial misconduct in the grand jury are not reviewable prior to conviction. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989).

The mistake in trying to transform the grand jury's Constitutional role as a shield against "reckless or unfounded charges" into a sword to cripple a defendant's ability to fight the indicted charges is underscored by the history of this case. Without a single victim claiming ownership of the allegedly stolen PMDs, the Kaleys were indicted on multiple counts alleging interstate transportation of stolen property. The initial indictment sought a forfeiture judgment of $2.2 million on a "proceeds" theory, when as the prosecutors later acknowledged, they could only trace $140,000 to the Kaleys. After the Magistrate Judge questioned the prosecutors' right to freeze all of the Kaleys' assets when only $140,000 was traceable to the assets restrained, it took the prosecutors only two business days to convince a grand jury to re-indict the Kaleys. Despite the transparency of all of the financial transactions, the superseding indictment added a money laundering charge with an amended demand for forfeiture under a facilitation

theory. That process can hardly be described as meaningful or reliable.

Supplementing the grand jury's ex parte finding of probable cause with an ex parte affidavit from an agent, as was done here, did little to lower the risk of error. Both the Georgia statute in *Di-Chem* and the Connecticut statute in *Doehr* included judicial review of the moving party's affidavits but that feature was not even enough in *Doehr* to excuse the failure to provide a pre-deprivation adversarial hearing.

The Court in *Good* also rejected as insufficient the use of a judge's ex parte review of an agent's affidavit without an opportunity to contest or to provide additional information. Such an "ex parte . . . proceeding affords little or no protection" when a magistrate judge or district court "need determine only that there is probable cause to believe" that the defendants will be convicted and the property forfeited. *Good*, 510 U.S. at 55-56. The Court in *Good* found a judge's ex parte review of an agent's affidavit to be inadequate in part because the government is "not required to offer any evidence on the questions of innocent ownership or other potential defenses a claimant might have." *Id.* at 55. *See also Doehr*, 501 U.S. at 14 ("Even if the provision requires the plaintiff to demonstrate, and the judge to find, probable cause to believe that judgment will be rendered in favor of the plaintiff, the risk of error was substantial in this case.").

Finally, a mere tracing inquiry – even in the context of an adversarial hearing – does not adequately guard against an erroneous deprivation. It provides no test "'aimed at establishing the validity, or at least the probable validity, of the [government's] underlying claim.'" *Fuentes*, 407 U.S. at 97 (quoting *Sniadach*, 395 U.S. at 343 (Harlan, J., concurring)).

3. The Government's Interests

The government's interests are minor when compared to the Kaleys' interests. The government has no property interest in the Kaleys' CD at this time. *See 92 Buena Vista Avenue*, 507 U.S. at 123-24, 127 (government is not the owner of property purchased with proceeds of illegal activity until forfeiture has been decreed). Rather, the government's interest is punitive – preserving the asset for forfeiture upon conviction. *See Libretti v. United States*, 516 U.S. 29, 39 (1995) (criminal forfeiture is punishment).

The other interest identified by the government is avoiding the "damaging premature disclosure of the government's case and trial strategy" associated with a pretrial hearing. *Bissell*, 866 F.2d at 1353. The government's objection overlooks that its right to maintain "'poker game' secrecy of its own witnesses," *Wardius v. Oregon*, 412 U.S. 470, 473 (1973), is only temporary in federal criminal cases. Once the Kaleys are arraigned, the government will have substantial discovery obligations under Fed. R. Crim. P. 16 that

must be completed well before trial. So the government's definable interest is not in altogether preventing, but delaying, disclosure long enough so that it denies defendants a meaningful opportunity to challenge the government's case against them. *Cf. Ake v. Oklahoma*, 470 U.S. 68, 79 (1985) ("A State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained.").

When the government seeks to use an indictment as the vehicle for freezing the Kaleys' assets, the government should expect to have to carry an additional burden. Placing such a burden on the government is no different in principle than the additional burdens the government must satisfy in order to detain a defendant until trial. The Court in *United States v. Salerno* held that the preventive detention provisions of the Bail Reform Act were constitutional, in part, because of the procedural safeguards contained in the statute, including a requirement that district courts consider "the weight of the evidence." 481 U.S. 739, 751-52 (1987) (citing 18 U.S.C. § 3142(g)). Therefore, at a detention hearing, a defendant is constitutionally permitted to challenge the government's evidence. *See, e.g., United States v. Lopez-De La Cruz*, 431 F. Supp. 2d 200. 203 (D.P.R. 2006) (granting defendant's release because "[e]ven though a grand jury has found probable cause to believe Mr. Lopez-De La Cruz guilty of a crime of violence," the "scant" evidence adduced at the detention hearing

through "the government's own witness, Agent Cosme, confirms that Lopez-De La Cruz did not assault or threaten" the informant).

The same principle applies here. Once the government seeks to wield the ex parte "probable cause" finding of a grand jury as a sword rather than as a shield, courts should be free to consider the weaknesses of the government's case in deciding whether to allow the government to cripple the defendant by freezing assets. To be sure, the government is not obligated to show all its cards, only as many as will "establish[ ] the validity, or at least the probable validity" of its claim that the restrained asset is forfeitable. *Fuentes*, 407 U.S. at 97 (quoting *Sniadach*, 395 U.S. at 343 (Harlan, J., concurring). If the government does not wish to reveal that quantum of evidence, then it can elect to forgo interim remedies, like the restraint of a defendant's property earmarked for the exercise of the Sixth Amendment right to counsel of choice.

In the Kaleys' case, in particular, the government's concern over premature disclosure of its evidence was overstated, indeed waived, because the government chose to try Gruenstrass alone while the Kaleys were on appeal in *Kaley I*. The four-day trial revealed far more than would normally emerge from the interim hearing requested by the Kaleys. It revealed the government's shifting theory of prosecution that struggled to identify even a single victim and resulted in an acquittal.

Ironically, the interim hearing proposed can actually serve the government's interest by exposing a misguided theory of prosecution early in the process. The prosecutor can then reassess whether to devote precious government resources to a case of questionable vitality.

* * *

A balance of the *Mathews* factors weighs decidedly in favor of a pretrial hearing at which the Kaleys can challenge more than just traceability.

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

HOWARD SREBNICK
Counsel of Record
BLACK, SREBNICK, KORNSPAN & STUMPF, P.A.
201 South Biscayne Blvd., Suite 1300
Miami, FL 33131
(305) 371-6421
HSrebnick@RoyBlack.com

G. RICHARD STRAFER
Co-Counsel for Petitioners
G. RICHARD STRAFER, P.A.
201 South Biscayne Blvd., Suite 1380
Miami, FL 33131
(305) 374-9091
StraferPA@aol.com

RESPONDENT'S BRIEF

No. 12-464

In the Supreme Court of the United States

KERRI L. KALEY AND BRIAN P. KALEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
SONJA M. RALSTON
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether an indicted defendant who asserts that a pretrial order restraining potentially forfeitable assets impairs his ability to retain counsel of choice, and who has been afforded a post-restraint hearing, must be permitted to challenge the order by attacking the grand jury's determination of probable cause to indict the defendant on the offenses as to which forfeiture is sought.

TABLE OF CONTENTS

Page

Constitutional and statutory provisions involved 1
Statement 1
A. The legal background 2
B. The present controversy 5
Summary of argument 12
Argument:
Petitioners had no right to challenge the grand jury's finding of probable cause 16
A. Reliance on the grand jury's probable-cause determination to justify a restraint of assets satisfies fundamental principles of justice 17
1. The Due Process Clause requires petitioners to establish that the denial of a hearing on probable cause offends a fundamental principle of justice 18
2. The grand jury's decision to indict has historically been deemed conclusive on the issue of probable cause 21
3. Reliance on the grand jury's determination of probable cause affords defendants the process constitutionally due 30
B. Even applying the *Mathews* v. *Eldridge* balancing test, petitioners would not be entitled to any additional process 37
1. Petitioners' interest in retaining counsel of choice, although real, is not as dominant as they contend 37
2. The governmental interests that would be compromised by a hearing on probable cause are substantial 40
3. The value of an adversary evidentiary hearing to revisit the grand jury's probable-cause determination is minimal 47
Conclusion 52

Table of Contents—Continued: Page

Appendix — Constitutional and statutory provisions 52

TABLE OF AUTHORITIES

Cases:

Albright v. *Oliver*, 510 U.S. 266 (1994) 21

Bain, Ex parte, 121 U.S. 1 (1887), overruled on other grounds, *United States* v. *Cotton*, 535 U.S. 625 (2002) 23

Baker v. *McCollan*, 443 U.S. 137 (1979) 25, 29

Barker v. *Wingo*, 407 U.S. 514 (1972) 36

Bracy v. *United States*, 435 U.S. 1301 (1978) 49

Branzburg v. *Hayes*, 408 U.S. 665 (1972) 23

Brinegar v. *United States*, 338 U.S. 160 (1949) 29

Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) 35

Caplin & Drysdale, Chartered v. *United States*, 491 U.S. 617 (1989) 4, 32, 38, 39, 41, 42

Connecticut v. *Doehr*, 501 U.S. 1 (1991) 35

Costello v. *United States*, 350 U.S. 359 (1956) .....*passim*

Dowling v. *United States*, 493 U.S. 342 (1990) 18

Ewing v. *Mytinger & Casselberry*, Inc., 339 U.S. 594 (1950) 27

FDIC v. *Mallen*, 486 U.S. 230 (1988) 27, 31

Florida v. *Harris*, 133 S. Ct. 1050 (2013) 49

Fuentes v. *Shevin*, 407 U.S. 67 (1972) 34, 35

Gerstein v. *Pugh*, 420 U.S. 103 (1975) .....*passim*

Gideon v. *Wainwright*, 372 U.S. 335 (1963) 39

Hale v. *Henkel*, 201 U.S. 43 (1906), overruled in part on other grounds, *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964) 23

Holt v. *United States*, 218 U.S. 245 (1910) 22

Cases—Continued: Page

James A. Merritt & Sons v. *Marsh*, 791 F.2d 328 (4th Cir. 1986) 28
Kalina v. *Fletcher*, 522 U.S. 118 (1997) 25
Lawn v. *United States*, 355 U.S. 339 (1958) 29
Libretti v. *United States*, 516 U.S. 29 (1996) 2
Marshall v. *Jerrico, Inc.*, 446 U.S. 238 (1980) 48
Maryland v. *King*, 133 S. Ct. 1958 (2013) 25
Mathews v. *Eldridge*, 424 U.S. 319 (1976) ..... *passim*
Medina v. *California*, 505 U.S. 437 (1992) 12, 18, 19
Mitchell v. *W.T. Grant Co.*, 416 U.S. 600 (1974) 35
Mooney v. *Holohan*, 294 U.S. 103 (1935) 18
North Ga. Finishing, Inc. v. *Di-Chem, Inc.*, 419 U.S. 601 (1975) 35
Patterson v. *New York*, 432 U.S. 197 (1977) 18
Powell v. Alabama, 287 U.S. 45 (1932) 40
Sciortino v. *Zampano*, 385 F.2d 132 (2d Cir. 1967), cert. denied, 390 U.S. 906 (1968) 25, 34
Snyder v. *Massachusetts*, 291 U.S. 97 (1934), overruled in part on other grounds, *Malloy* v. *Hogan*, 378 U.S. 1 (1964) 18
Stirone v. *United States*, 361 U.S. 212 (1960) 24
Strickland v. *Washington*, 466 U.S. 668 (1984) 39
Tumey v. *Ohio*, 273 U.S. 510 (1927) 48
United States, Ex parte, 287 U.S. 241 (1932) 22, 25
United States v. *Bissell*, 866 F.2d 1343 (11th Cir.), cert. denied, 493 U.S. 876 (1989) 8, 36
United States v. *Calandra*, 414 U.S. 338 (1974) 22, 33
United States v. *Celis*, 608 F.3d 818 (D.C. Cir.), cert. denied, 131 S. Ct. 620 (2010) 45
United States v. *Contreras*, 776 F.2d 51 (2d Cir. 1985) 26, 33

Cases—Continued: Page

United States v. *Dionisio*, 410 U.S. 1 (1973) 23, 24
United States v. *E-Gold, Ltd.*, 521 F.3d 411 (D.C. Cir. 2008) 5
United States v. *$8,850*, 461 U.S. 555 (1983).....35, 36
United States v. *Farmer*, 274 F.3d 800 (4th Cir. 2001)....4, 5
United States v. *Gonzalez-Lopez*, 548 U.S. 140 (2006).....39
United States v. *Holy Land Found. for Relief*, 493 F.3d 469 (5th Cir. 2007) 44
United States v. *James Daniel Good Real Property*, 510 U.S. 43 (1993) 34, 38, 48
United States v. *Johnson*, 319 U.S. 503 (1943).....30
United States v. *Jones*, 160 F.3d 641 (10th Cir. 1998)....5, 45
United States v. *Lopez-De La Cruz*, 431 F. Supp. 2d 200 (D.P.R. 2006) 26
United States v. *Lovasco*, 431 U.S. 783 (1977) 18, 26, 51
United States v. *Monsanto*:
491 U.S. 600 (1989).....*passim*
924 F.2d 1186 (2d Cir.), cert. denied, 502 U.S. 943 (1991).....5, 43, 49
United States v. *Motamedi*, 767 F.2d 1403 (9th Cir. 1985) 26
United States v. *Page*, 808 F.2d 723 (10th Cir.), cert. denied, 482 U.S. 918 (1987).....49
United States v. *Reed*, 27 F. Cas. 727 (C.C.N.D.N.Y. 1852) (No. 16,134) 21
United States v. *Rigas*, 281 F. Supp. 2d 660 (S.D.N.Y. 2003) 41
United States v. *Ruiz*, 536 U.S. 622 (2002) 45
United States v. *Salerno*, 481 U.S. 739 (1987).....26
United States v. *Sells Eng'g, Inc.*, 463 U.S. 418 (1983).....33

Cases—Continued: Page

United States v. *Stone*, 608 F.3d 939 (6th Cir.), cert. denied, 131 S. Ct. 439 (2010) 26
United States v. *Ursery*, 518 U.S. 267 (1996) 2
United States v. *Vargas*, 804 F.2d 157 (1st Cir. 1986) 26
United States v. *Von Neumann*, 474 U.S. 242 (1986) 36
United States v. *Williams*, 504 U.S. 36 (1992) 23, 28, 29, 35, 48
Weatherford v. *Bursey*, 429 U.S. 545 (1977) 44
Wheat v. *United States*, 486 U.S. 153 (1988) 40
Wood v. *Georgia*, 370 U.S. 375 (1962) 23

Constitution, statutes, regulations and rules:

U.S. Const.:
Amend. V (Due Process Clause) ..... *passim*
Amend. VI ..... *passim*
Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.* 25, 44
18 U.S.C. 3142(e)(2)-(3) 25
18 U.S.C. 3142(f) 25
18 U.S.C. 3142(g)(2) 26
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976:
21 U.S.C. 853 ..... 2, 3, 10, 37, 40
21 U.S.C. 853(c) 42
21 U.S.C. 853(e) 31
21 U.S.C. 853(e)(1) 2, 51
21 U.S.C. 853(e)(1)(A) 1, 3, 7, 19, 20, 40
21 U.S.C. 853(e)(1)(B) 2, 20
12 U.S.C. 1818(g)(3) 27
18 U.S.C. 371 6
18 U.S.C. 922(n) 27

Statutes, regulations and rules—Continued: Page

18 U.S.C. 1503 45
18 U.S.C. 1512 45
18 U.S.C. 1512(b)(3) 6
18 U.S.C. 1513 45
18 U.S.C. 1956(h) 6
18 U.S.C. 2314 6
18 U.S.C. 3060(e) 25
28 U.S.C. 524(c) 48
28 U.S.C. 2461(c) 2
28 C.F.R. 9.8 41
48 C.F.R.:
Ch. 2, App. H-102 28
Section 9.407-2 28
Fed. R. Crim. P.:
Rule 5.1(a)(2) 25
Rule 5.1(c) 25
Rule 5.1(d) 25
Rule 5.1(e) 25
Rule 6(d) 33
Rule 6(e) 33
Rule 6(f) 24
Rule 9(a) 25
Rule 16(a)(2) 44
Rule 26.2(a) 43
Rule 32.2(a) 3, 6

Miscellaneous: Page

Administrative Office of the U.S. Courts, *Handbook for Federal Grand Jurors*, http://www.uscourts.gov/uscourts/FederalCourts/Jury/grandhandbook2007.pdf (last visited Aug. 29, 2013) 24

4 William Blackstone, *Commentaries* 23

Bruce A. Baird & Carolyn P. Vinson, *RICO Pretrial Restraints and Due Process: The Lessons of* Princeton/Newport, 65 Notre Dame L. Rev. 1009 (1990) 48

Bureau of Justice Statistics, U.S. Dep't of Justice, *Federal Criminal Case Processing Statistics*, http://bjs.gov/fjsrc/tsec.cfm 45

Stefan D. Cassella, *Criminal Forfeiture Procedure: An Analysis of Developments in the Law*, 32 Am. J. Crim. L. 55 (Fall 2004) 44

Edward Coke, *The Second Part of the Institutes of the Laws of England* (1642) 28

DOJ returned $1.5 billion to victims of crime, Arizona Daily Independent, Apr. 29, 2013, http://www.arizonadailyindependent.com/2013/04/29/doj-returned-1-5-billion-to-victims-of-crime/ 41

Edward S.G. Dennis, Jr., *The Discovery Process In Criminal Prosecutions: Toward Fair Trials and Just Verdicts*, 68 Wash. U.L.Q. 63 (Spring 1990) 45

Anna Griffin, *Café au Play Succeeds At Site Of Former Portland Drug-Plagued Property*, The Oregonian, Sept. 10, 2010, http://www.oregonlive.com/news/oregonian/anna_griffin/index.ssf/2010/09/cafe_au_play_a_successful_port.html##Static 42

Miscellaneous—Continued: Page

Patricia Hurtado, *Adelphia Fraud Funds Give More Than $728 Million to Victims*, Bloomberg News, Apr. 30, 2013, http://www.bloomberg.com/news/2012-04-30/adelphia-fraud-funds-give-more-than-728-million-to-victims-1-.html 41

Judicial Conference of the U.S., *Model Grand Jury Charge* (Mar. 2005), http://www.uscourts.gov/FederalCourts/JuryService/ModelGrandJuryCharge.aspx 24

John May, *Attorney Fees and Government Forfeiture*, Champion 20 (Apr. 2010) 46

Office of the Attorney General, U.S. Dep't of Justice, *Order No. 2088-97* (June 14, 1997), www.justice.gov/criminal/afmls/forms/pdf/victms-faqs.pdf 41

S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 3, 10, 19, 20, 43, 45

3 Joseph Story, *Commentaries on the Constitution* (1833) 23

U.S. Dep't of Justice:

Returning Forfeited Assets to Crime Victims, www.justice.gov/criminal/afmls/forms/pdf/victms-faqs.pdf 41

U.S. Dep't. of Justice Overview, http://www.justice.gov/jmd/2014summary/pdf/fy14-bud-sum.pdf 48

United States Attorneys' Annual Statistical Report, Fiscal Year 2012 50

United States Attorneys' Manual (1997) 51

In the Supreme Court of the United States

No. 12-464

KERRI L. KALEY AND BRIAN P. KALEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

In 2007, a federal grand jury returned a superseding indictment charging petitioners with various offenses and giving notice that the government would seek criminal forfeiture of property traceable to or involved in the offenses. Pursuant to 21 U.S.C. 853(e)(1)(A), the district court granted a pretrial restraining order barring petitioners from transferring or disposing of the relevant property. Petitioners moved to vacate the order, alleging that it prevented them from retaining counsel of choice, and sought a pretrial hearing to challenge the restraint. Ultimately, the district court gave petitioners

an opportunity for a hearing, at which petitioners challenged only the grand jury's determination of probable cause to believe they had committed the charged criminal offenses. The district court refused to hold a hearing on that issue. Pet. App. 43. The court of appeals affirmed. *Id.* at 1-37.

A. The Legal Background

1. Criminal forfeitures are imposed at sentencing "primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct." *United States* v. *Ursery*, 518 U.S. 267, 284 (1996); see *Libretti* v. *United States*, 516 U.S. 29, 39 (1996). Section 853 of Title 21, enacted in the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976, includes procedural provisions that apply to criminal forfeitures under nearly all other federal statutes, including the statute at issue in this case. See 28 U.S.C. 2461(c). Among other things, Section 853 authorizes an order before trial "preserv[ing] the availability of property" that may ultimately be forfeited, so that the property is not dissipated before a conviction. 21 U.S.C. 853(e)(1).

Before the filing of an indictment, the court may enter a restraining order only temporarily and only if it determines, after an "opportunity for a hearing," that "there is a substantial probability that the United States will prevail on the issue of forfeiture"; that "failure to enter the order will result in the property being destroyed, removed * * *, or otherwise made unavailable for forfeiture"; and that "the need to preserve the availability of the property * * * outweighs the hardship on any party against whom the order is to be entered." 21 U.S.C. 853(e)(1)(B). After an indictment, however, the court "may enter a restraining order" or

take other appropriate action ex parte, so long as the indictment charges an offense for which criminal forfeiture may be imposed and "alleg[es] that the property * * * would, in the event of conviction, be subject to forfeiture." 21 U.S.C. 853(e)(1)(A); see Fed. R. Crim. P. 32.2(a) (providing that an indictment must give notice that the government will seek forfeiture, but "need not identify the property subject to forfeiture").

Although the statute does not specify any hearing with respect to an order entered after the filing of an indictment, the relevant Senate Report states that a court has the "authority to hold a hearing subsequent to the initial entry of the order," at which time the court can "modify the order or vacate an order that was clearly improper (*e.g.*, where information presented at the hearing shows that the property restrained was not among the property named in the indictment)." S. Rep. No. 225, 98th Cong., 1st Sess. 203 (1983) (Senate Report). But it also states that "at such a hearing the court is not to entertain challenges to the validity of the indictment" or otherwise "look behind" it; rather, "[f]or the purposes of issuing a restraining order, the probable cause established in the indictment * * * is to be determinative of any issue regarding the merits of the government's case on which the forfeiture is to be based." *Id.* at 202-203.

2. In *United States* v. *Monsanto*, 491 U.S. 600 (1989), this Court held that Section 853 "authorizes a district court to enter a pretrial order freezing assets in a defendant's possession, even where the defendant seeks to use those assets to pay an attorney" and that "such an order is permissible under the Constitution." *Id.* at 602.

The Court concluded that Section 853 "is unambiguous in failing to exclude assets that could be used to pay

an attorney from its definition of forfeitable property." *Monsanto*, 491 U.S. at 607. The Court also relied on *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989), to reject the argument that the Fifth and Sixth Amendments "require[] Congress to permit a defendant to use assets" that are forfeitable under the statute "to pay that defendant's legal fees." 491 U.S. at 614.

Finally, *Monsanto* considered whether the government may "freez[e] the assets in question before [the defendant] is convicted * * * and before they are finally adjudged to be forfeitable." 491 U.S. at 615. The Court held that "assets in a defendant's possession may be restrained" based on "a finding of probable cause to believe that the assets are forfeitable." *Ibid.*

The *Monsanto* Court did not consider, however, "whether a hearing was required by the Due Process Clause" to establish probable cause and, if so, what would make such a hearing "adequate." 491 U.S. at 615 n.10. The Court explained that such consideration was not warranted because the government had "prevailed in the District Court notwithstanding [a] hearing" and the court of appeals had not addressed procedural due process. *Ibid.*

Although this Court did not address the issue in *Monsanto*, the courts of appeals have agreed that a defendant has no right to a pre-restraint hearing. They have also generally agreed that a defendant has no right to a post-restraint hearing except in the limited situation in which he has established that he has no assets other than the restrained funds with which to retain counsel of his choice. See, *e.g.*, *United States* v. *Farmer*, 274 F.3d 800, 804-805 (4th Cir. 2001) (stating that a defendant has no interest in a post-restraint hearing

unless he can show that he does not have "the means to hire an attorney independently of assets that were seized"); *United States* v. *Jones*, 160 F.3d 641, 647 (10th Cir. 1998) ("As a preliminary matter, a defendant must demonstrate to the court's satisfaction that she has no assets, other than those restrained, with which to retain private counsel and provide for herself and her family."). The lower courts differ as to the proper scope of any such hearing, however. All of the courts that have considered the issue allow a defendant to argue at a hearing that there is no probable cause to believe a nexus exists between the property to be restrained and the offense charged in the indictment. See, *e.g.*, *Farmer*, 274 F.3d at 803-806; *Jones*, 160 F.3d at 648-649. A smaller number of courts also allow a challenge to the grand jury's finding of probable cause to believe that the defendant committed the charged crime giving rise to forfeiture. See *United States* v. *Monsanto*, 924 F.2d 1186, 1200, 1203 (2d Cir.) (en banc), cert. denied, 502 U.S. 943 (1991); *United States* v. *E-Gold, Ltd.*, 521 F.3d 411, 416, 419 (D.C. Cir. 2008). The issue presented in this case is whether the latter courts have correctly held that defendants who have been granted a post-restraint hearing have a due process right to challenge the probable cause underlying the criminal charge.

B. The Present Controversy

1. In January 2005, petitioner Kerri Kaley, then a sales representative with Ethicon Endo-Surgery (a subsidiary of Johnson & Johnson), learned that she and her husband, petitioner Brian Kaley, were targets of a federal grand jury investigation in the Southern District of Florida. Pet. App. 3. The grand jury was investigating a scheme to steal prescription medical devices and resell them for profit. See *ibid.*

Each of the petitioners retained an attorney. Pet. App. 3. The two attorneys explained that they would charge a total of approximately $500,000 to litigate the case through a trial. See *ibid.* To raise the funds, petitioners obtained a home equity line of credit of $500,000, which they used to purchase a certificate of deposit. See *ibid.* They later added funds to the certificate. See 07-cr-80021 Docket entry No. 17, at 7 (S.D. Fla.) (Docket entry No.).

On February 6, 2007, the grand jury indicted petitioners and co-defendant Jennifer Gruenstrass. J.A. 29-40. The indictment charged all three defendants with conspiracy to transport prescription medical devices in interstate commerce while knowing them to have been stolen, in violation of 18 U.S.C. 371 (Count 1); transportation of stolen devices in interstate commerce, in violation of 18 U.S.C. 2314 (Counts 2-6); and obstruction of justice, in violation of 18 U.S.C. 1512(b)(3) (Count 7). J.A. 31-39. The indictment also notified petitioners of the government's intent, in the event of a conviction, to seek forfeiture of "all property, real and personal, constituting proceeds obtained from the aforestated offense(s) and all property traceable to such property," including the certificate of deposit. J.A. 40; see Fed. R. Crim. P. 32.2(a).

On April 10, 2007, the grand jury returned a superseding indictment that added a count against petitioners and Gruenstrass: conspiracy to launder the proceeds of the Section 2314 offenses, in violation of 18 U.S.C. 1956(h). J.A. 58-59. The superseding indictment alleged that the certificate of deposit and petitioners' residence were "involved in" the commission of the Section 1956(h) offense and were therefore subject to forfeiture. J.A. 60-61.

2. Upon "the filing of [the] indictment," 21 U.S.C. 853(e)(1)(A), the United States moved ex parte to restrain petitioners from transferring or otherwise disposing of the certificate of deposit and other property traceable to the alleged offenses. Pet. App. 4. The district court entered the requested order. Pet. App. 106; J.A. 44-47.[1]

Petitioners sought to vacate the order, arguing that without the restrained assets they would not be able to "retain counsel of choice." Docket entry No. 17, at 8; see Docket entry No. 53, at 6; Pet. App. 51-52. Meanwhile, at the request of a magistrate judge, the government filed under seal the declaration of a special agent "in support of [the] probable cause determination as to [the] restraint of the principal residence and the certificate of deposit." Docket entry No. 79.

On May 2, 2007, the magistrate judge rejected petitioners' arguments and entered an amended restraining order. J.A. 67-68; Pet. App. 5. The judge concluded that "[p]robable cause to * * * restrain defendants' principal residence and certificate of deposit exists," Docket entry No. 80; see Pet. App. 5, and that petitioners were not entitled to a hearing to challenge "the validity of the indictment itself," *id.* at 108-109 (citation omitted).

On review of the magistrate judge's action, the district court "released" $63,007.65 of the amount in the certificate of deposit "from the protective order," but otherwise affirmed. Pet. App. 104. The court agreed that "the United States has demonstrated probable cause to believe that [petitioners'] residence was 'involved in' the money laundering offense charged in the superseding indictment" and that the bulk of "the funds

---

[1] The government also filed a notice of *lis pendens* against petitioners' residence. See Docket entry 17, at 7; Docket entry 82, at 2.

used to obtain the certificate of deposit are 'traceable to' the residence." *Id.* at 95-96. Applying *United States* v. *Bissell*, 866 F.2d 1343 (11th Cir.), cert. denied, 493 U.S. 876 (1989), the court also concluded that petitioners did not have a due process right to an evidentiary hearing to "challenge the underlying merits of the indictment" before trial. Pet. App. 97.

3. On interlocutory appeal, the court of appeals reversed and remanded for further consideration of whether a pretrial evidentiary hearing was warranted. Pet. App. 56-72. The Eleventh Circuit agreed that *Bissell* provided the proper framework for the analysis, but held that an evidentiary hearing could address the "propriety" of the restraint even though it could not address petitioners' "guilt or innocence." *Id.* at 68. The court of appeals instructed the district court to "engage in a more searching exposition and calculus" of the possible prejudice that petitioners would suffer if they were unable to "retain * * * counsel of choice" (or "any private counsel" at all) and to determine if a hearing was warranted. *Id.* at 69-71.

Judge Tjoflat specially concurred. He would have applied the balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and remanded "with instructions to afford the Kaleys a pretrial hearing at which they could show that the Government did not have probable cause to restrain[] their assets." Pet. App. 86, 92-93.

4. On remand, the district court concluded that petitioners were "entitled to an evidentiary hearing." Pet. App. 45. The court stated that the restraint "at issue, if

wrongful, will deprive [petitioners] of their ability to retain counsel of their choice." *Id.* at 46.[2]

At the evidentiary hearing, petitioners stated that they were "not contesting that the assets restrained were involved in and traceable to the conduct" alleged in the superseding indictment. J.A. 107. Rather, their only argument was that the government was not likely to succeed in establishing forfeitability because its "case against them is 'baseless.'" Pet. App. 39. Petitioners supported that argument—which was based on the theory that they were voluntarily supplied with millions of dollars of prescription medical devices and had no obligation to return those devices to Ethicon—by submitting transcripts from Gruenstrass's trial, which had resulted in an acquittal, as well as other documentary evidence. See Pet. App. 7, 22 n.6, 65.[3]

---

[2] Petitioners were represented at the time by the very counsel they wished to retain (as they had been from the beginning of the case, and still are); those counsel had entered "temporary" appearances for purposes of litigating the asset-restraint issues. See, *e.g.*, J.A. 100, 147.

[3] The Gruenstrass trial did not include all of the government's evidence against the petitioners, who dealt with entities and obtained and sold devices that Gruenstrass did not. As to the petitioners, the government put on evidence that (*inter alia*) Kerri Kaley was in charge of the scheme to obtain medical devices from hospitals and recruited other pharmaceutical representatives to join it; that Kerri Kaley sometimes told the others to obtain specific products so that she could resell them; that petitioners made millions of dollars from their resale activities and paid their recruits substantial sums by means of checks written from company accounts for Brian Kaley's construction companies; and that petitioners took steps to conceal what they were doing from investigators, including removal of devices stored at their house. See Docket entry No. 184, at 52-53, 59, 85-86, 93-97, 100-102, 148-154, 192, 233-234, 243-244, 271-272; Docket entry No. 185, at 346-348, 353-354.

The district court declined to vacate the asset-restraint order. See Pet. App. 43. The court held that the only question properly before it was "whether the restrained assets are traceable to or involved in the alleged criminal conduct." *Id.* at 43 n.5. The court concluded that because petitioners had confined themselves to "challenging the validity of the indictment," they had not shown that continued restraint of their assets was improper. See *id.* at 42-43.

5. In a second interlocutory appeal, the court of appeals affirmed. Pet. App. 1-37. Agreeing that the "only issue" before it was "the nature and scope" of the post-restraint, pretrial hearing, the court ruled that petitioners were not entitled "to challenge the factual foundation supporting the grand jury's probable cause determinations"—that is, "the very validity of the underlying indictment." *Id.* at 2, 9, 13.

The court first concluded that 21 U.S.C. 853 did not require a hearing on probable cause in order to continue a post-indictment restraining order. Pet. App. 15; see also *id.* at 10-11. Allowing a defendant to challenge "the factual underpinnings of the underlying charges," the court noted, "would be at war with th[e] legislative history," which stated that a court that decides to hold a hearing "*is not to entertain challenges to the validity of the indictment.*" *Id.* at 16 (quoting Senate Report 203).

The court rejected the argument that due process nevertheless requires that, once a defendant is granted a hearing, he must be permitted to challenge the existence of probable cause. See Pet. App. 17; see *id.* at 23. The court highlighted a "long line of case authority" that bars a defendant from "challeng[ing] whether there is a sufficient evidentiary foundation to support the grand jury's probable cause determination." *Id.* at 21-22; see

id. at 17-21 (citing *Costello* v. *United States*, 350 U.S. 359 (1956), and stating that "*Costello* and its progeny evince a powerful reluctance to allow pretrial challenges to the *evidentiary* support for an indictment"). And the court explained that petitioners sought to mount just such a "pretrial direct assault on the indictment": they proposed to "lay[] out an elaborate theory that * * * the goods (the prescription medical devices) were not stolen in the first place," and to do so by "adduc[ing] additional evidence not presented to the grand jury." *Id.* at 22.

In the view of the court of appeals, such a challenge would have several damaging effects. First, it would "undermin[e] the grand jury system" and contravene the rule that a facially valid indictment "is enough to call for trial * * * on the merits." Pet. App. 23 (citation and internal quotation marks omitted). Second, it would "effectively require the district court to try the case twice," inserting a "mini-trial" between the grand jury's probable-cause determination and "the trial itself," even though the trial gives a defendant a full opportunity to address "the merits of the underlying charge." *Id.* at 25. Finally, requiring such a "mini-trial" would interfere with "the pretrial preservation of assets" that Congress sought to ensure, since it would force the government to a choice between "prematurely revealing its evidence" and forgoing a restraint that might be the only way to guard against dissipation of forfeitable property. *Id.* at 26, 28-29.

Judge Edmondson concurred in the result, explaining that he would likely "reach a different result" if he were

writing on a blank slate but was not persuaded that the outcome was "definitely erroneous." Pet. App. 32, 37.[4]

SUMMARY OF ARGUMENT

Petitioners, whose assets were restrained before trial for potential forfeiture and who claim a need for those assets to retain counsel of choice, assert a right under the Fifth and Sixth Amendments to a pretrial hearing to contest the grand jury's determination of probable cause. The Constitution guarantees no such right. This Court has settled that potentially forfeitable assets may be restrained before trial on a showing of probable cause, despite a claim that the funds are needed to retain counsel. *United States* v. *Monsanto*, 491 U.S. 600 (1989). And the contention that a pretrial judicial hearing is available to contest the probable cause underlying a grand jury's indictment conflicts with more than a century of precedent holding that a grand jury's finding of probable cause is conclusive in a criminal case.

A. 1. The proper due process test for reviewing petitioners' claim is set forth in *Medina* v. *California*, 505 U.S. 437, 445 (1992): a rule of criminal procedure does not violate due process unless it offends a principle of justice so deeply rooted as to be ranked as fundamental. Petitioners' reliance on the balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), overlooks the nature of their substantive claim: that the grand jury's indictment, though unreviewable in a criminal case, becomes reviewable when used to support a pretrial restraint of forfeitable assets. That claim intrinsically challenges the deeply rooted rule of criminal procedure immunizing the grand jury's determination of probable

---

[4] On remand from the second appeal, the district court stayed the case pending this Court's disposition. Docket entry No. 259.

cause from such inquiries and is therefore governed by the *Medina* test.

2. Petitioners' claim fails under *Medina*. The inviolability of the grand jury's determination of probable cause is itself a deeply rooted principle of American justice. The Bill of Rights makes the grand jury the charging body for serious federal crimes precisely because the Framers recognized that process as a fair method for instituting charges. *Costello* v. *United States*, 350 U.S. 359, 361-363 (1956). As a rule, therefore, challenges to the factual sufficiency of the grand jury's findings are impermissible. *Ibid.* This principle holds true even when the grand jury indictment is used to support a pretrial restraint on the defendant's liberty: the grand jury's finding of probable cause makes a judicial finding on that issue unnecessary. *Gerstein* v. *Pugh*, 420 U.S. 103, 117 n.19 (1975). And this Court's confidence in the grand jury rests on functional considerations as well: the grand jury is a constitutionally independent body, composed of disinterested members of the community, and is well suited to determine when charges are justified and when they are not.

Many significant consequences flow from an indictment that impinge on liberty and property interests. An indicted defendant may be arrested and held for trial; he loses any right under the federal rules to an adversary preliminary hearing before trial; he may be presumed a flight risk and a danger to the community under the Bail Reform Act; and he may lose firearms rights, be suspended from his job, or face the loss of government contracts. All of these consequences ensue despite the absence of any right to test the grand jury's probable cause finding in an adversary proceeding.

3. Against that background, petitioners cannot show that the denial of their requested hearing offends fundamental justice. If a defendant can be deprived of *liberty* pending trial based on the grand jury's indictment, without an adversary hearing on probable cause, the same must be true of the defendant's *property* interests.

Petitioners' invocation of the Sixth Amendment's qualified right of counsel of choice does not alter the conclusive character of the grand jury's probable-cause determination. This Court has noted that restrained assets might be used to exercise any number of constitutional rights, and yet no hearing is required; the qualified right to counsel of choice is no different. And allowing such a hearing would create the anomalous prospect of continuing to a criminal trial based on the grand jury's finding of probable cause while releasing the defendant's assets based on a finding that probable cause does not exist.

Petitioners rely on this Court's cases involving post-deprivation hearings in *civil* matters based on *interested parties'* ex parte showings. Those cases have no relevance where independent grand jurors have found probable cause, which has historically been conclusive in the criminal process.

B. Even under the *Mathews* test, petitioners' claim fails.

1. On the defendant's side of the balance: the qualified right of counsel of choice is important, but a pretrial restraint of forfeitable assets does not necessarily limit access to such counsel. Even when it does, the public interest in preserving those assets for forfeiture overrides the defendant's interests when probable cause exists.

2. On the government's side of the balance: an adversary evidentiary hearing on the merits of the government's case threatens premature disclosure of the government's witnesses and evidence, which can jeopardize the safety of witnesses and the integrity of the fact-finding process at trial. Defendants have powerful incentives to seek premature disclosure of the government's case, and the prospect of such hearings may force the government to abandon post-indictment restraints. That would result in the dissipation of assets Congress intended to be available for criminal punishment and restitution to victims.

3. The benefits of the procedure that petitioners seek do not justify those costs. Despite petitioners' portrayal of the grand jury as a one-sided and ineffectual body, for centuries the criminal process has relied on the grand jury to perform its role faithfully and responsibly. And given the nontechnical nature of the fair-probability threshold for probable cause, a nonadversarial process has always been thought sufficient.

Experience confirms that an adversarial post-indictment hearing would add little if any value. Although such hearings have been available in the Second Circuit for two decades, the government is aware of *no* case in which a court has disagreed with the grand jury's determination of probable cause to believe that the defendant committed a crime. And the high conviction rate in the federal courts suggests that an indictment reflects not just probable cause, but a high likelihood of guilt; even acquittals show only a reasonable doubt, not an absence of probable cause in the first instance.

In a rare case, it is conceivable that an adversary hearing may expose a lack of probable cause, despite the safeguards in the system. But a rule that broadly in-

vites such challenges to winnow out the needle in the haystack cannot be found to be constitutionally compelled, given its serious costs. And nothing in this case suggests that petitioners' case is that truly rare instance in which the grand jury produced an unfounded accusation.

ARGUMENT

PETITIONERS HAD NO RIGHT TO CHALLENGE THE GRAND JURY'S FINDING OF PROBABLE CAUSE

"[A] finding of probable cause to believe that * * * assets are forfeitable," this Court has held, provides a constitutionally valid basis for a pretrial restraining order covering forfeitable "assets in a defendant's possession." *United States* v. *Monsanto*, 491 U.S. 600, 615 (1989). That is so even when a defendant claims that he needs the restrained funds to hire private counsel for his defense. *Id.* at 614-615. Petitioners accept that principle and its application to their case, but contend that the Fifth and Sixth Amendments guarantee them a pretrial evidentiary hearing at which they may challenge the grand jury's determination of probable cause to believe that they committed a crime. Br. 29-32.

That contention contravenes the long-standing principle that a grand jury's determination of probable cause is unreviewable in a criminal case and is not subject to attack based on a claim of evidentiary sufficiency. Petitioners can cite no decision in the history of the grand jury in which this Court has allowed a departure from that rule. And even if it were appropriate to conduct an interest-balancing review to decide whether due process mandates the opportunity for such a challenge to the grand jury's finding, petitioners' claims would fail. Petitioners overstate the private interest affected by a pretrial restraint of assets, while understating the gov-

ernment interest in avoiding a premature attack on its case through a challenge to the probable-cause determination. And, critically, petitioners provide no valid reason to question the time-honored reliability of the grand jury's determination of probable cause—or any reason to think that defendants would prevail in an evidentiary hearing in any but the most rarely encountered case. Rather, experience indicates that such challenges would almost always fail. Under those circumstances, the Due Process Clause does not require overturning the traditional rule that the grand jury's probable-cause determination is conclusive.

A. Reliance On The Grand Jury's Probable-Cause Determination To Justify A Restraint Of Assets Satisfies Fundamental Principles Of Justice

Petitioners contend that their due process claim is governed by the standard for addressing procedural due process challenges announced in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976)—a case that devised a balancing test to determine whether a recipient of social security benefits had a right to an evidentiary hearing before those benefits were terminated. Br. 33-34 & n.12. But petitioners' claim that they have a right to attack the grand jury's probable-cause determination when it is used to support the pretrial restraint of forfeitable assets assertedly needed to retain counsel does not challenge solely an interference with property rights. Rather, it challenges the finding of the grand jury—a body enshrined in the Bill of Rights and historically empowered to initiate criminal prosecutions by making an unreviewable determination of probable cause. In those circumstances, resort to the *Mathews* balancing framework is not appropriate. Rather, the proper due process test is found in cases asking whether a rule of criminal proce-

dure violates fundamental concepts of justice long reflected in the traditions of the United States. Here, the rule that the grand jury's determination of probable cause is sacrosanct reflects, rather than violates, long-settled traditions.

1. The Due Process Clause requires petitioners to establish that the denial of a hearing on probable cause offends a fundamental principle of justice

In *Medina* v. *California*, 505 U.S. 437, 443 (1992), this Court explained that "the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which * * * are part of the criminal process." Instead, the Court drew on *Patterson* v. *New York*, 432 U.S. 197 (1977), which rejected a due process challenge to a provision placing a burden of proof on the defendant to show an affirmative defense of extreme emotional disturbance. *Patterson* held that a criminal procedure rule does not violate due process unless it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina*, 505 U.S. at 445 (quoting *Patterson*, 432 U.S. at 202). That test accorded with earlier decisions reviewing both state and federal rules of criminal procedure challenged on due process grounds. See, *e.g.*, *Dowling* v. *United States*, 493 U.S. 342, 352-353 (1990) (asking whether federal procedural rule violated "fundamental conceptions of justice") (quoting *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977) (quoting *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935))); *Gerstein* v. *Pugh*, 420 U.S. 103, 125 n.27 (1975); *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (1934), overruled in part on other grounds by *Malloy* v. *Hogan*, 378 U.S. 1 (1964).

The *Medina* Court explained that "[t]he Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." 505 U.S. at 443. Given that "the criminal process is grounded in centuries of common-law tradition," the Court concluded, "it is appropriate to exercise substantial deference to legislative judgments in this area." *Id.* at 445-446. The *Medina* test applies here because petitioners attack a quintessential and historic feature of the criminal justice system: the unreviewable character of the grand jury's probable-cause determination.

Petitioners attempt to brush aside *Medina* by characterizing this case as involving "the timing and scope of the hearings required when the government interferes with property rights." Br. 34 n.12. But the "interference" with property rights here has not occurred in a vacuum. Rather, the return of the indictment charging petitioners with criminal offenses supplies the very basis for the restraint. 21 U.S.C. 853(e)(1)(A); Senate Report 202 ("[T]he probable cause established in the indictment * * * is, in itself, * * * a sufficient basis for issuance of a restraining order."). Nor can petitioners' due process claim be divorced from the substantive issue they seek to litigate at an evidentiary hearing: whether there is probable cause to believe that they committed the charged criminal offenses. While the Due Process Clause undoubtedly has a role to play in regulating the pretrial restraint of assets in a criminal case, the *particular* procedure at issue here—the grand jury's constitutionally assigned role of assessing probable cause—lies

at the core of the criminal justice system. Under those circumstances, petitioners' claim that Congress has denied them a procedure necessary to provide due process should be reviewed under the *Medina* framework.[5]

---

[5] Petitioners effectively acknowledge that 21 U.S.C. 853(e)(1)(A) makes no provision for a post-indictment hearing on whether the grand jury correctly found probable cause to believe that they committed an offense supporting asset forfeiture. Br. 32. The statutory structure makes that concession wise. Compare 21 U.S.C. 853(e)(1)(B) (requiring hearing assessing the "substantial probability that the United States will prevail" when the government seeks to restrain assets before indictment) with 21 U.S.C. 853(e)(1)(A) (permitting pretrial restraint of assets without such an assessment when an indictment charges an offense for which criminal forfeiture may be imposed and "alleg[es] that the property * * * would, in the event of conviction, be subject to forfeiture"); see Pet. App. 11 ("The difference between these two subparagraphs unambiguously demonstrates that Congress contemplated the issue of a hearing, but decided not to require one post-indictment."). And the legislative history leaves no doubt that Congress did not contemplate any post-restraint review of probable cause. While the Senate Report stated that a post-restraint hearing might be held to "vacate an order that was clearly improper (*e.g.*, where information presented at the hearing shows that the property restrained was not among the property named in the indictment)," Senate Report 203, it also emphasized that the court "is not to 'look behind' the indictment or require the government to produce additional evidence regarding the merits of the case as a prerequisite to issuing a post-indictment restraining order," *id.* at 202. Because petitioners declined to challenge anything at a hearing except the grand jury's finding of probable cause to believe that they committed the offenses charged, Pet. App. 38-40 (noting that petitioners "specifically declined to attempt to rebut the government's claim that the seized assets are traceable to or involved in the activity alleged in the indictment"), no other due process issue is presented in this case.

2. The grand jury's decision to indict has historically been deemed conclusive on the issue of probable cause

Petitioners' claim of a due process right to challenge the grand jury's probable-cause determination cannot be sustained under *Medina*'s fundamental-justice test. To the contrary, reliance on the grand jury's probable-cause determination *defines* a fundamental principle of justice. See *Albright* v. *Oliver*, 510 U.S. 266, 282 (1994) (Kennedy, J., concurring in the judgment) ("With respect to the initiation of charges, * * * the specific guarantees contained in the Bill of Rights mirror the traditional requirements of the criminal process.").

a. This Court has long held that "[a]n indictment returned by a legally constituted and unbiased grand jury, * * * if valid on its face, is enough to call for trial of the charge on the merits," without any inquiry into the "adequacy of the evidence before the grand jury" to establish probable cause. *Costello* v. *United States*, 350 U.S. 359, 363 (1956). The Court rested that holding on the grand jury's heritage and place in the Constitution. In English practice, the Court recognized, the grand jury was understood "to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes." *Id.* at 362. The Court viewed "[i]ts adoption in our Constitution as the sole method for preferring charges in serious criminal cases" as reflecting "the high place it held as an instrument of justice." *Ibid.* And the Court found no authority for "looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof." *Id.* at 362-363 (quoting *United States* v. *Reed*, 27 Fed. Cas. 727, 738 (C.C.N.D.N.Y. 1852) (No. 16, 134) (Nelson, J.),

and citing *Holt* v. *United States*, 218 U.S. 245, 247-248 (1910) (Holmes, J.)). A rule "permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence," the Court reasoned, rested on "[n]o persuasive reasons" and "would run counter to the whole history of the grand jury institution." *Id.* at 364.

In *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), the Court confirmed the principle that the grand jury's finding of probable cause conclusively begins the criminal process and governs the ensuing proceedings. *Gerstein* held that a judicial determination of probable cause is ordinarily required to support a post-arrest restraint of the liberty of a person arrested without a warrant. *Id.* at 116-119. But the Court recognized an exception to that rule when a grand jury has determined probable cause by returning an indictment. *Id.* at 117 n.19. The Court noted that it had held that "an indictment, 'fair upon its face,' and returned by a 'properly constituted grand jury,' *conclusively determines the existence of probable cause*." *Ibid.* (quoting *Ex parte United States*, 287 U.S. 241, 250 (1932)) (emphasis added). And the Court explained that its "willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution." *Ibid.* (citing *United States* v. *Calandra*, 414 U.S. 338, 342-346 (1974)). Thus, an indictment—which embodies the grand jury's probable-cause determination—can itself justify an "extended restraint of liberty following arrest." *Id.* at 114, 117 n.19.

b. The Court's confidence in the grand jury rests not only on history, but on that body's fitness to evaluate the

prosecutor's evidence dispassionately in light of the common-sense judgment of the community. As the Court has observed, the grand jury "serves the invaluable function * * * of standing between the accuser and the accused, * * * to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962). Thus, its "mission is to clear the innocent, no less than to bring to trial those who may be guilty." *United States* v. *Dionisio*, 410 U.S. 1, 16-17 (1973); see, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 47, 51-52 (1992) (stating that the grand jury serves "as a kind of buffer or referee between the Government and the people" with the "twin historical responsibilities" of "bringing to trial those who may be justly accused and shielding the innocent from unfounded accusation and prosecution"). The Court has consistently recognized that protective mission of the grand jury. *Gerstein*, 420 U.S. at 117 n.19; *Branzburg* v. *Hayes*, 408 U.S. 665, 686-687 (1972); *Hale* v. *Henkel*, 201 U.S. 43, 59 (1906), overruled in part on other grounds by *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964); *Ex parte Bain*, 121 U.S. 1, 10-11 (1887) (quoting grand jury charge of Justice Field), overruled on other grounds by *United States* v. *Cotton*, 535 U.S. 625 (2002); see also 3 Joseph Story, *Commentaries on the Constitution* § 1779 (1833), reprinted in 5 *The Founders' Constitution* 295 (Philip B. Kurland & Ralph Lerner eds. 1987); 4 William Blackstone, *Commentaries* *301-303.

The grand jury's independence equips it to serve as such a buffer. A grand jury is supervised by the court and hears from the prosecutor, but it is separate from both of them, belonging to "no branch of the institutional government." *Williams*, 504 U.S. at 47-48; see *id.* at

53; *Dionisio*, 410 U.S. at 16 (stating that the "constitutional guarantee" of a grand jury "presupposes an investigative body 'acting independently of either prosecuting attorney or judge'") (quoting *Stirone* v. *United States*, 361 U.S. 212, 218 (1960)). Thus, federal grand jurors are charged that they serve as "an independent body" that does not act as "an arm or agent of" the U.S. Attorney's Office, "the Federal Bureau of Investigation, the Drug Enforcement Administration, the Internal Revenue Service, or any governmental agency charged with prosecuting a crime."[6] Based on the information it obtains, the grand jury's role is to indict if it finds probable cause and to return no true bill if it does not—even if a prosecutor's complaint or information is pending. See Fed. R. Crim. P. 6(f).

c. The serious consequences of an indictment underscore the legal importance attached to the grand jury's unreviewable determination of probable cause. An indicted defendant is required to answer the criminal charges and, absent another disposition, stand trial, all without judicial review of the basis of the charge. *Costello*, 350 U.S. at 363-364. And other specific conse-

---

[6] Judicial Conference of the U.S., *Model Grand Jury Charge* (Mar. 2005), http://www.uscourts.gov/FederalCourts/JuryService/ModelGrandJuryCharge.aspx; see *id.* ("It is your duty to see to it that indictments are returned only against those who you find probable cause to believe are guilty and to see to it that the innocent are not compelled to go to trial. [. . .] If the facts suggest that you should not indict, then you should not do so, even in the face of the opposition or statements of the government attorney. You would violate your oath if you merely 'rubber-stamped' indictments brought before you by the government representatives."); Administrative Office of the U.S. Courts, *Handbook for Federal Grand Jurors* 3-4, 14, http://www.uscourts.gov/uscourts/FederalCourts/Jury/grandhandbook2007.pdf (last visited Aug. 29, 2013).

quences of indictment have enormous significance for the defendant's liberty and property.

First, an indictment triggers the issuance of an arrest warrant, without the need for further inquiry into the defendant's likely guilt or innocence. See *Ex parte United States*, 287 U.S. at 249-251; Fed. R. Crim. P. 9(a); see also *Kalina* v. *Fletcher*, 522 U.S. 118, 129 (1997). The arrest on an indictment seriously affects the defendant's privacy, see *Maryland* v. *King*, 133 S. Ct. 1958, 1978 (2013), and liberty interests, *Baker* v. *McCollan*, 443 U.S. 137, 142-143, 145-146 (1979).

Second, an unindicted defendant generally has a right to a preliminary hearing, not later than 21 days after an initial appearance, at which a magistrate judge will determine whether there is "probable cause to believe an offense has been committed and the defendant committed it." Fed. R. Crim. P. 5.1(c), (d) and (e). At that hearing, the defendant "may cross-examine adverse witnesses and may introduce evidence." *Id.* 5.1(e). But no such hearing is required if "the defendant is indicted." *Id.* 5.1(a)(2); see 18 U.S.C. 3060(e). "A post-indictment preliminary examination would be an empty ritual, as the government's burden of showing probable cause would be met merely by offering the indictment." *Sciortino* v. *Zampano*, 385 F.2d 132, 133 (2d Cir. 1967), cert. denied, 390 U.S. 906 (1968).

Third, the grand jury's determination that probable cause exists to believe that a defendant committed certain particularly serious crimes gives rise to a presumption under the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, that the defendant is not eligible for release before the trial because no condition or combination of conditions can assure the defendant's appearance or the safety of the community. See 18 U.S.C. 3142(e)(2)-(3)

and (f); see also, *e.g.*, *United States* v. *Vargas*, 804 F.2d 157, 163-164 (1st Cir. 1986); *United States* v. *Contreras*, 776 F.2d 51, 53-55 (2d Cir. 1985) (concluding that "the presence of an indictment returned by a duly constituted grand jury conclusively establishes the existence of probable cause for the purpose of triggering" that presumption). And even for a defendant to whom such a presumption does not apply, the grand jury's probable-cause determination is never revisited by a court; the court's consideration of the "weight of the evidence" in the detention decision, 18 U.S.C. 3142(g)(2), is relevant only insofar as it sheds light on whether the defendant is likely to flee (because the case against him is so strong) or presents a danger to the community. See, *e.g.*, *United States* v. *Stone*, 608 F.3d 939, 948 (6th Cir.) ("This factor goes to the weight of the evidence of dangerousness, not the weight of the evidence of the defendant's guilt."), cert. denied, 131 S. Ct. 439 (2010); *United States* v. *Motamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985); see also *United States* v. *Salerno*, 481 U.S. 739, 749-750 (1987).[7]

Fourth, the grand jury's probable-cause determination impinges on a defendant's property interests. As a practical matter, "a formal accusation may," without any further government action, "disrupt [the defendant's] employment" and "curtail his associations." *Lovasco*,

---

[7] The single district court decision that petitioners cite (Br. 62) in this regard, *United States* v. *Lopez-De La Cruz*, 431 F. Supp. 2d 200 (D.P.R. 2006), confirms that conclusion. The court in that case looked at the "weight of the evidence" only to decide whether any conditions of release could "reasonably assure the safety of * * * the community," and ruled that the facts presented at the bail hearing—which included community ties and a "health condition"—did not support the view that defendant was too dangerous to release. See *id.* at 203.

431 U.S. at 791 (internal quotation marks and citation omitted); see *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950) (stating that "[t]he harm to property and business can also be incalculable by the mere institution of [criminal] proceedings" by a grand jury). Those effects are almost certainly magnified if the defendant is detained. *Gerstein*, 420 U.S. at 114 (noting that "[p]retrial confinement may imperil the suspect's job" and "interrupt his source of income").

An indictment may also have direct legal consequences for a defendant's property interests and employment. An indictment restricts a person's right to receive or transport a firearm or ammunition in interstate commerce. See 18 U.S.C. 922(n) (making such shipment or receipt unlawful "for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year"). It also may establish grounds for suspending the employment of employees in regulated industries. See *FDIC* v. *Mallen*, 486 U.S. 230, 241, 244 (1988) (holding that such a "suspension is not arbitrary" because there is "little likelihood that the deprivation" of the property right "is without basis" when "an independent body has determined that there is probable cause to believe that the officer has committed a crime").[8] And indictment may justify suspending a government contractor from eligibility for contracting with

---

[8] The statute in *Mallen* afforded a suspended bank officer "the right to a post-suspension hearing before the agency to demonstrate that his or her continued service would not jeopardize the interests of [bank] depositors or impair public confidence in the bank." 486 U.S. at 235 (describing 12 U.S.C. 1818(g)(3)). But that post-suspension hearing made no provision for revisiting the grand jury's probable-cause finding, and this Court made clear that no such inquiry was required or permitted. *Id.* at 244 (grand jury's finding "*demonstrates* that the suspension is not arbitrary") (emphasis added).

the United States. See, *e.g.*, *James A. Merritt & Sons* v. *Marsh*, 791 F.2d 328, 330-331 (4th Cir. 1986) (explaining that grand jury's finding of probable cause has "sufficient indicia of reliability" to support a suspension without a hearing, despite indicted defendant's argument that suspension would result in "irrecoverable monetary losses"); see also 48 C.F.R. 9.407-2 (explaining that "[i]ndictment for" fraud or various other specified crimes "constitutes adequate evidence for suspension"); 48 C.F.R. Ch. 2, App. H-102 ("In a suspension action based upon an indictment * * * , there will be no fact-fi[nd]ing proceeding concerning the matters alleged in the indictment.").[9]

d. Those restrictions on an indicted defendant's rights are imposed without affording the defendant the opportunity to present his own evidence or employ the various "formalities and safeguards designed for trial," such as "confrontation and cross-examination" of witnesses. *Gerstein*, 420 U.S. at 121-122; see *Williams*, 504 U.S. at 51-52 (tracing the history of this aspect of grand-jury procedure back to 18th-century England and the early days of the United States). That is because the existence of probable cause to believe that a person committed a crime "can be determined reliably without

---

[9] The history of the grand jury supports reliance on its probable-cause determination to impose consequences like these. See, *e.g.*, Edward Coke, *The Second Part of the Institutes of the Laws of England* 50 (1642 ed.) (stating "that no man [can] be taken, imprisoned, or put out of his free-hold without process of the Law; that is, by indictment or presentment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the Common law"); *id.* at 54 ("A Commission was made under the great Seale to take I.N. (a notorious felon) and to seize his lands, and goods: This was resolved to be against the Law of the Land, unlesse he had been endicted, or appealed by the party, or by other due Process of Law.").

an adversary hearing." *Gerstein*, 420 U.S. at 120; see *id.* at 121-123 (explaining that the value of additional safeguards in determining probable cause would be "too slight" and "the Constitution does not require" them); see also *Williams*, 504 U.S. at 51-52 (stating that "to make the assessment" of probable cause "it has always been thought sufficient to hear only the prosecutor's side"); *Baker*, 443 U.S. at 143. The reliability of a less elaborate procedure stems from the "nature of the determination itself"; ascertaining whether probable cause exists "does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt." *Gerstein*, 420 U.S. at 121-122; see *Williams*, 504 U.S. at 53 (explaining that the grand jury may "choose[] to hear no more evidence than that which suffices to convince it an indictment is proper"); *Brinegar* v. *United States*, 338 U.S. 160, 174-175 (1949).

A defendant thus has no right to attack the grand jury's probable-cause finding as based on a one-sided presentation, or to demand additional procedural rights in seeking a new, more favorable finding from a different decisionmaker. This Court has repeatedly rebuffed attempts to impose on the grand-jury process restrictions or requirements intended to make it more trial-like. See *Williams*, 504 U.S. at 52-55 (rejecting requirement that prosecutor present exculpatory evidence to a grand jury); *Costello*, 350 U.S at 361-364 (rejecting challenge to indictment on the ground that "there was inadequate or incompetent evidence before the grand jury"); *Lawn* v. *United States*, 355 U.S. 339, 348-350 (1958) (rejecting claim that defendants had a

right to a preliminary hearing to determine whether grand jury may have relied on evidence obtained in violation of their Fifth Amendment rights); *United States* v. *Johnson*, 319 U.S. 503, 513 (1943) (rejecting view that a "mere challenge, in effect, of the regularity of a grand jury's proceedings * * * cast[s] upon the government the affirmative duty of proving such regularity"; "[n]othing could be more destructive of the workings of our grand jury system or more hostile to its historic status").

3. Reliance on the grand jury's determination of probable cause affords defendants the process constitutionally due

As the court of appeals recognized (Pet. App. 17-31), those deeply rooted principles are dispositive. Petitioners seek a post-restraint hearing to ask precisely the same question that the grand jury already answered: whether probable cause exists to believe that they committed the charged crimes. But petitioners have not argued that the grand jury was biased or improperly constituted, or that the indictment is invalid on its face. See *Costello*, 350 U.S. at 363. Accordingly, the workings of the grand jury—including exercise of that body's core function of protecting the wrongly accused from indictment—satisfy the requirements of due process, without the need for a post-indictment opportunity for a judicial determination of probable cause.

a. That conclusion flows logically from *Gerstein*, *supra*. If the grand jury's determination of probable cause is "conclusive[]" when a defendant's *liberty* is at stake pending trial--precisely because the judicial system has confidence in the grand jury's historic role of protecting individuals against unfair accusations (420 U.S. at 117 n.19)—the same must be true when a defendant's *prop-*

erty interest is at stake as the result of an order restraining potentially forfeitable assets. Each restraint is designed to preserve the government's ability to prosecute the case to conclusion and obtain the judgment authorized by law, given the threshold finding of probable cause to believe that the defendant committed a crime. And in each instance the historic balance has been struck in favor of treating the grand jury's unreviewable determination that probable cause exists as inviolable.

Petitioners' position appears to be that an indicted defendant's rights with respect to assets that the government seeks to restrain are subject to greater procedural protections than his or her other liberty and property rights. But this Court has already remarked on the illogic of such an assertion, explaining that "it would be odd to conclude that the Government may not restrain" such assets, "based on a finding of probable cause, when we have held that (under appropriate circumstances), the Government may restrain *persons* where there is a finding of probable cause to believe that the accused has committed a serious offense." *Monsanto*, 491 U.S. at 615-616; see *Mallen*, 486 U.S. at 241. As *Monsanto* explained, because a defendant can be "subjected to pretrial restraint if deemed necessary to 'reasonably assure [his] appearance [at trial] and the safety of . . . the community,'" no "constitutional infirmity" inheres "in [21 U.S.C.] § 853(e)'s authorization of a similar restraint on [a defendant's] property to protect its 'appearance' at trial and protect the community's interest in full recovery of any ill-gotten gains." 491 U.S. at 616.

Petitioners' reliance (Br. 32) on the qualified Sixth Amendment right of counsel of choice does not alter the conclusive character of the grand jury's determination

of probable cause. In the context of the liberty interests restricted by a pretrial restraint of the person, a purported effect on the defendant's defense does not give rise to a due process right to challenge the grand jury's determination. See *Gerstein*, 420 U.S. at 123 (pointing out that "pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense"). The same analysis applies when a defendant seeks to bolster the property interests affected by a pretrial restraint of assets by asserting a desire to use those assets to retain counsel. This Court has already factored in the possibility that a defendant might wish to use forfeitable assets to exercise Sixth Amendment rights and has found "no such distinction between, or hierarchy among, constitutional rights." *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 628 (1989). After all, "[i]f defendants have a right" to challenge probable cause in order to seek the release of forfeitable assets to spend "on attorney's fees, why not on exercises of the right to speak, practice one's religion, or travel?" *Ibid.* "The full exercise of these rights, too, depends in part on one's financial wherewithal," the Court has noted, and pretrial restraint "may similarly prevent a defendant from enjoying these rights as fully as he might otherwise." *Ibid.* Yet the Court declined "to recognize an antiforfeiture exception for the exercise of each such right; nor does one exist for the exercise of Sixth Amendment rights." *Ibid.*

For the same reasons, petitioners' desire to use the restrained property to pay for counsel cannot elevate their claim above any other constitutionally protected use of financial or other resources. And the addition of the Sixth Amendment to their due process claim thus

does not overcome the historic unreviewability of the grand jury's determination of probable cause.

b. Affording petitioners an opportunity to second-guess the grand jury could have anomalous and destabilizing consequences. To the extent that petitioners seek a window into the grand jury's deliberations to determine whether the evidence presented to it actually rose to the level of probable cause—that is, to hold "a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury," *Costello*, 350 U.S. at 363—that exercise would invade the closely guarded secrecy of the grand-jury process. See *United States* v. *Sells Eng'g, Inc.*, 463 U.S. 418, 424-425 (1983); Fed. R. Crim. P. 6(d) and (e). Such judicial intrusion into the workings of the grand jury is not in keeping with its constitutional status as an entity that belongs to neither the executive nor the judicial branch. See *Calandra*, 414 U.S. at 349-352 (placing weight on "the potential injury to the historic role and functions of the grand jury"); *Costello*, 350 U.S. at 363 (ruling that such a duplicative effort "is not required by the Fifth Amendment").

It seems more likely that petitioners seek a separate inquiry that does not peer into the grand jury's workings and may well involve evidence that the grand jury never heard. See, *e.g.*, Br. 25-27; Pet. App. 22. That type of inquiry could produce highly "incongruous" results, however. *Contreras*, 776 F.2d at 55. "Should the judicial officer determine that for the purpose of the * * * hearing no probable cause exists that the defendant committed the crime for which he was indicted, presumably the defendant would still be brought to trial upon the same indictment." *Ibid.* (finding no right to challenge the grand jury's probable-cause finding in a

detention hearing); see *Sciortino*, 385 F.2d at 133 (stating that a preliminary examination is not necessary for an indicted defendant because "[e]ven if the [judicial officer] disagreed with the grand jury, he could not undermine the authority of its finding").

Thus, petitioners seek a system in which the defendant might simultaneously be told that probable cause exists to believe that he committed a crime for purposes of proceeding to trial (and, if appropriate, restraining him in prison) but no probable cause exists to believe that he committed a crime for purposes of restraining his assets. This legal cognitive dissonance can only jeopardize the integrity of the criminal justice system. Not only would it damage the public's confidence in the criminal proceedings, but it would also undercut the grand jury's status as the "sole method for preferring charges in serious criminal cases" and diminish the "high place it [has] held as an instrument of justice." *Costello*, 350 U.S. at 362.

c. None of this Court's civil cases evaluating the right to a pre- or post-seizure hearing, on which petitioners rely (see Br. 36-45, 57), gave rise to such dangers. Indeed, none of those cases arose in a criminal proceeding after a determination of probable cause by a grand jury—a procedural context with its own history and its own "safeguards," including specific constitutional protections. See *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 50, 62 n.3 (1993). And none involved a prior determination on the very issue in dispute after consideration of evidence by a neutral arbiter like the grand jury.

For instance, the statutes at issue in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), instructed a "court clerk" or a "prothonotary" to issue a seizure order "summarily"

on receipt of a private person's "bare assertion * * * that he is entitled to one." *Id.* at 73-74; see *id.* at 75-77; *North Ga. Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 604 n.2, 607 (1975) (involving a similar state statute). Similarly, the statute at issue in *Connecticut* v. *Doehr*, 501 U.S. 1 (1991), permitted an attachment on the basis of a private person's "skeletal affidavit" and "conclusory" complaint, documents so spare that they permitted "no realistic assessment concerning the likelihood of an action's success." *Id.* at 13-14. And in *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 604-606, 610 (1974), the Court upheld a statute permitting an ex parte sequestration order for household goods, in part because the debtor "may immediately have a full hearing on the matter of possession following the execution of the writ," but the initial basis for the seizure in that case—an affidavit by the *creditor* seeking repossession—hardly reflected the decision of a neutral party constitutionally charged with "shielding the innocent from unfounded accusation and prosecution." *Williams*, 504 U.S. at 51.

The few *civil* forfeiture decisions that involve a relevant probable-cause determination made in a criminal case are consistent with holding that such a determination is a sufficient basis for a restraint of assets. See *Monsanto*, 491 U.S. at 615-616 (noting "our established rule of permitting pretrial restraint of assets based on probable cause" and citing *United States* v. *$8,850*, 461 U.S. 555 (1983), and *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)). Most relevant is *$8,850*, in which this Court upheld a civil seizure of property for forfeiture when a grand jury had found probable cause to believe the owner had committed a crime giving rise to forfeiture, the criminal proceeding

was unfolding for a period of time before civil forfeiture proceedings were commenced, and the property was retained by the government pending the institution of those proceedings. See 461 U.S. at 560-561, 567, 569-570.[10]

In short, no basis exists here for departing from the centuries-old rule that the grand jury provides the appropriate procedure for deciding whether probable cause exists to believe a crime has been committed. As

---

[10] The issue in *$8,850* was whether delay in filing a civil forfeiture proceeding deprived the property owner of due process. 461 U.S. at 561-562. The Court resolved that issue by borrowing the four-factor speedy-trial inquiry set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972). See *$8,850*, 461 U.S. at 564-565. That test does not readily correspond to the nature of the claim at issue here. Petitioners do not argue that their trial on the merits is unjustifiably delayed, but rather that the pretrial seizure of their property is not validly based on probable cause and is causing them immediate harm. A later trial is therefore not a substitute for what petitioners seek: an immediate pretrial hearing to address the probable-cause issue because of the pretrial restraint's impact on their access to counsel of choice to defend against the criminal charges. Cf. *United States* v. *Von Neumann*, 474 U.S. 242, 249 (1986) ("Implicit in this Court's discussion of timeliness in *$8,850* was the view that the [ultimate] forfeiture proceeding, without more, provides the postseizure hearing required by due process to protect Von Neumann's property interest."). But see Pet. App. 6, 56-63 (applying *$8,850* framework based on *United States* v. *Bissell*, 866 F.2d 1343 (11th Cir.), cert. denied, 493 U.S. 876 (1989)). Regardless, the applicability of *$8,850* is not pivotal here: petitioners already *had* a pretrial hearing where they were afforded the opportunity to challenge the nexus between the restrained assets and the charges against them. The question is whether petitioners were also entitled at that hearing to challenge the grand jury's finding of probable cause. See Pet. App. 8-9, 21-22 (recognizing that a hearing was held under *Bissell*, but holding that "a defendant cannot challenge whether there is a sufficient evidentiary foundation to support the grand jury's probable cause determination").

Congress correctly recognized in enacting Section 853, second-guessing that venerable body is not required by "justice [ ]or the concept of a fair trial." *Costello*, 350 U.S. at 364.

B. Even Applying the *Mathews* v. *Eldridge* Balancing Test, Petitioners Would Not Be Entitled To Any Additional Process

Petitioners argue that the balancing test set forth in *Mathews*, *supra*, should govern the due process analysis in this case. For all of the reasons set forth above, the *Mathews* test has no application here. But even if the Court applied that test, petitioners would not prevail. *Mathews* outlined a three-factor test that considers "the private and governmental interests at stake" as well as "the nature of the existing procedures"—that is, "the risk of an erroneous deprivation * * * through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335, 340. The private interest at stake here is not as powerful as petitioners contend, and the government interest is far more substantial than they portray. And, critically, the risk of erroneous deprivation is low without the requested evidentiary hearing, and that additional procedure would have little or no value.

1. Petitioners' interest in retaining counsel of choice, although real, is not as dominant as they contend

Petitioners' interest does not tip the *Mathews* balance in their favor. Petitioners argue (Br. 51-55) that their interest in disposing of the restrained assets while the criminal case proceeds is overwhelming because

they need the assets to pay for counsel of choice.[11] The qualified constitutional right to retain counsel of choice is, of course, a significant interest. But this Court has already concluded that the "burden placed on defendants" by Section 853 in that regard is "a limited one." *Caplin*, 491 U.S. at 624-625; see *Monsanto*, 491 U.S. at 616. A pretrial asset-restraint case "does not involve a situation where the Government has asked a court to prevent a defendant's chosen counsel from representing the accused." *Caplin*, 491 U.S. at 625. Petitioners can use their nonforfeitable assets, to the extent available, to "retain[] any attorney of [their] choosing." *Ibid.*[12] And even assuming that petitioners have no unre-

---

[11] Petitioners also assert more generally (Br. 51-52) that they have "long-standing title to their home and CD." The restraint at issue here is not, however, a physical seizure. It is therefore a less serious intrusion than the ones at issue in the civil-forfeiture cases on which petitioners rely. See *Good*, 510 U.S. at 57-58 (identifying *lis pendens* as appropriate procedure with respect to real property in civil forfeiture context); *Monsanto*, 491 U.S. at 615.

[12] Although the courts below proceeded on the premise that the pretrial restraint of assets would deprive petitioners of counsel of choice, Pet. App. 13, 46, petitioners' assets were last scrutinized several years ago, and even then they had $325,000-$350,000 available for counsel, although tapping those funds would have triggered taxes and penalties. Pet. App. 110. Their financial situation may well have improved since that time. See Docket entry No. 252, at 6 n.10 ("The United States recognizes that in the intervening 3+ years, some alteration of the economic circumstances of the defendants may have occurred. In fact, the government is aware that the lead defendant [Kerri Kaley] is actively employed in the healthcare industry, owns her own boutique and has been profiled regarding the financial success of that company in the media."). Whatever this Court's disposition, the issue of whether the restraint in this case actually impairs petitioners' ability to pay for counsel should be left open for further proceedings in the district court. See pp. 4-5, *supra*.

strained assets available, they might still "be able to find lawyers willing to represent them, hoping that their fees will be paid in the event of acquittal, or via some other means that a defendant might come by in the future." *Ibid.*; see *id.* at 632 n.10 (explaining that such an arrangement would not represent the kind of "contingency fee" that is forbidden in a criminal case).[13]

Petitioners protest that even the "limited" burden identified in *Caplin* is too onerous, because their counsel of choice have declined to proceed unless the restraint on the assets is released. But the right to select one particular desired counsel is often—and quite permissibly—restricted by principles of general applicability serving important public purposes. For instance, a defendant cannot insist on representation by a lawyer who is not a member of the relevant bar or whose schedule cannot conform to the "demands" of the court's calendar; a defendant also lacks entitlement to select counsel whose rates she cannot afford (unless that counsel is willing to represent her anyway), or to use someone else's property to pay those rates, or to avoid taxation on the ground that the money is needed for legal representation. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 144-145, 151-152 (2006); see *Caplin*, 491 U.S. at 624-626, 631 ("Otherwise, there would be an interference with a defendant's Sixth Amendment rights whenever

---

[13] Moreover, in no event could a restraint on assets deprive petitioners of representation sufficient to ensure fair proceedings. The Sixth Amendment requires the appointment of counsel for an indigent defendant on trial for a serious crime, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and counsel must play "the role necessary to ensure that the trial is fair," *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984). The vast majority of criminal defendants proceed with appointed counsel.

the Government freezes or takes some property in a defendant's possession before, during, or after a criminal trial. * * * Criminal defendants * * * are not exempted from federal, state, and local taxation simply because these financial levies may deprive them of resources that could be used to hire an attorney."); *Wheat* v. *United States*, 486 U.S. 153, 159 (1988) (stating that the right to counsel of choice is "circumscribed in several important respects"). That does not amount to the kind of "arbitrar[y]" interference with a defendant's choice that this court has deemed problematic. *Monsanto*, 491 U.S. at 616 (quoting *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932)).

Those principles apply here. Petitioners' inability to pay the full fee of the particular counsel they wish to hire results from policies that promote general public interests. It is not the product of an effort to disrupt their relationship with any particular lawyer. See *Monsanto*, 491 U.S. at 616 (stating that "a pretrial restraining order" under Section 853 "does not 'arbitrarily' interfere with a defendant's 'fair opportunity' to retain counsel"). The interest weighing on their side of the *Mathews* balance, therefore, cannot be deemed paramount to all other considerations in the criminal justice system.

2. The governmental interests that would be compromised by a hearing on probable cause are substantial

The government has substantial interests in proceeding under Section 853(e)(1)(A) to preserve potentially forfeitable assets without the pretrial evidentiary hearing petitioners seek. The additional procedure that petitioners advocate would add a layer of complexity and expense to pretrial proceedings in cases involving a post-restraint hearing and would risk damaging disclo-

sures of the government's case and trial strategy. See *Mathews*, 424 U.S. at 335 (stating that the burdens associated with using different procedural safeguards weigh on the "Government's interest" side of the balance).

a. Pretrial restraint of assets serves to "protect the community's interest in full recovery of any ill-gotten gains" upon conviction, *Monsanto*, 491 U.S. at 616, and "there is a strong governmental interest in obtaining full recovery of all forfeitable assets," *Caplin*, 491 U.S. at 631. First, criminal forfeiture helps ensure that crime does not pay, thereby punishing wrongdoing, deterring future bad acts, and draining the economic power from existing "organized crime and drug enterprises" and other criminals—including the "undeserved economic power * * * to command high-priced legal talent." *Id.* at 630 (internal quotation marks and citation omitted); see *id.* at 634 ("Forfeiture provisions are powerful weapons in the war on crime.").

Second, the government uses forfeited money to "return[] property * * * to those wrongfully deprived or defrauded of it" and to improve conditions in communities affected by the crimes giving rise to the forfeiture. *Caplin*, 491 U.S. at 629; see, *e.g.*, 28 C.F.R. 9.8; Office of the Attorney General, *Order No. 2088-97* (June 14, 1997); U.S. Dep't of Justice, *Returning Forfeited Assets to Crime Victims*, www.justice.gov/criminal/afmls/forms/pdf/victms-faqs.pdf.[14] The interest in ensuring

---

[14] The United States has returned "more than $1.5 billion in forfeited assets to more than 400,000 crime victims since January 2012." *DOJ returned $1.5 billion to victims of crime*, Arizona Daily Independent, Apr. 29, 2013; see, *e.g.*, Patricia Hurtado, *Adelphia Fraud Funds Give More Than $728 Million to Victims*, Bloomberg News, Apr. 30, 2013 (citing *United States* v. *Rigas*, No. 02-cr-1236

that victims are compensated by those who harm them is compelling. *Caplin*, 491 U.S. at 629 (describing the interest at issue as "virtually indistinguishable from [the government's] interest in returning to a bank the proceeds of a bank robbery").

Third, the government uses forfeited funds to "support[] law-enforcement efforts in a variety of important and useful ways," *Caplin*, 491 U.S. at 629, including maintenance of prisons and training of law enforcement personnel. The "interest in using the profits of crime to fund these activities should not be discounted." *Ibid.*

Thus, petitioners and their amici are quite wrong in suggesting that the government acts to preserve potentially forfeitable assets in the hopes of swelling its coffers. See Br. 56 (citing Cato Amicus Br. 11). Forfeited money is used to compensate victims, fight crime, and serve the public, and significant benefits will be lost if forfeiture cannot be accomplished because assets have been dissipated.[15]

(S.D.N.Y.)); Anna Griffin, *Café au Play succeeds at site of former Portland drug-plagued property*, The Oregonian, Sept. 10, 2010.

[15] The force of the government's interest in preserving assets for forfeiture is reflected in the relation-back principle of Section 853(c), which provides that the government's interest in forfeitable property relates back to the date of the criminal offense. See 21 U.S.C. 853(c). Petitioners are correct (Br. 61) that Section 853(c) does not give the government a present ownership interest in their property. But the government's interest is nevertheless very real, because a grand jury has determined that probable cause exists to believe that the government will obtain a guilty verdict and a forfeiture order pursuant to which "[a]ll right, title, and interest" in the property will be deemed "vest[ed] in the United States" as of "commission of the act giving rise to forfeiture." 21 U.S.C. 853(c); see *Caplin*, 491 U.S. at 627 (characterizing "the property rights given the Government by virtue of the forfeiture statute" as "substantial").

b. The extra procedure that petitioners seek would significantly burden the government's interests in a variety of ways. Petitioners envision an elaborate evidentiary proceeding—in effect, a trial before they have even been arraigned. See Pet. App. 22 & n.6; *id.* at 25-26 (stating that hearing on probable cause of guilt would "effectively require the district court to try the case twice"). Adding such a supplementary procedure will consume scarce prosecutorial resources, and divert overburdened trial judges and magistrates from speedily disposing of criminal cases, in order to revisit a determination the grand jury has already made. See *Monsanto*, 491 U.S. at 605 (district court held a four-day hearing on whether to continue restraining order); *Gerstein*, 420 U.S. at 122 n.23 ("Criminal justice is already overburdened by the volume of cases and the complexities of our system."); *Costello*, 350 U.S. at 363; see also pp. 33-34, *supra* (explaining the possibility of conflicting probable-cause determinations in the same case).

More importantly, holding a "mini-trial" on guilt well in advance of the trial itself could damage the integrity of the ensuing criminal case. Pet. App. 25-26. As the court of appeals observed, such a procedure would risk the premature disclosure of the government's case and trial strategy. *Id.* at 27 (citing Senate Report 162); see *United States* v. *Monsanto*, 924 F.2d 1186, 1206 (2d Cir.) (en banc) (Cardamone, J., dissenting), cert. denied, 502 U.S. 943 (1991). Although petitioners are correct (Br. 61-62) that the government is required to make evidentiary disclosures at some point in the proceedings, a post-restraint hearing on guilt would give the defendant access to that evidence well in advance of the deadlines set by the relevant rules—indeed, even before arraignment. See, *e.g.*, Fed. R. Crim. P. 26.2(a) (requiring dis-

closure of prior statement of testifying witness only after witness has testified at trial); see also Fed. R. Crim. P. 16(a)(2); *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977); *United States* v. *O'Keefe*, 128 F.3d 885, 898-899 (5th Cir. 1997), cert. denied, 523 U.S. 1078 (1998). Savvy defendants would therefore seek to exploit the proposed mini-trial to evade the careful limitations of the discovery rules—and they might do so not only for their own benefit, but also for the use of associates who are fugitives or who have not yet been indicted. See Stefan D. Cassella, *Criminal Forfeiture Procedure: An Analysis of Developments in the Law*, 32 Am. J. Crim. L. 55, 63 (Fall 2004) (explaining that "defendants tend to demand the hearing not because they are aggrieved by the restraining order, but to afford defense counsel an early opportunity to discover the nature of the Government's criminal case and to cross-examine some of the Government's witnesses"); see also *United States* v. *Holy Land Found. for Relief*, 493 F.3d 469, 475-476 (5th Cir. 2007) (en banc) (referring to the danger of "frivolous challenges that might impede [the government's] ongoing criminal investigations"); Pet. App. 26 n.8 (noting that such a "sneak preview" would never be available to a defendant without assets that the government seeks to restrain, "even if he faces capital charges").[16]

---

[16] Amici suggest that the risk of disclosure is no greater than in other contexts in which the government might be asked to put on proof of a factual question during pretrial proceedings. See, *e.g.*, Amicus Br. of Cal. Attorneys for Crim. Justice 11-28. All of the examples provided by amici, however, go to discrete factual questions rather than to the overarching question of whether probable cause exists to believe that the defendant committed the crime charged. Accordingly, none presents the same risks as the disclosure that petitioners seek. See, *e.g.*, pp. 25-26, *supra* (discussing statutory requirements of the Bail Reform Act).

Premature disclosure of evidence could, in turn, jeopardize the safety of witnesses, including victims and cooperators. See Pet. App. 27 (citing Senate Report 162); *United States* v. *Jones*, 160 F.3d 641, 647 (10th Cir. 1998). That problem would be particularly acute in cases involving terrorism, drug trafficking, organized crime, and political corruption, because those are crimes as to which "witness tampering is part of the criminal culture." Edward S.G. Dennis, Jr., *The Discovery Process In Criminal Prosecutions: Toward Fair Trials and Just Verdicts*, 68 Wash. U.L.Q. 63, 68 (Spring 1990); see, *e.g.*, *United States* v. *Ruiz*, 536 U.S. 622, 631-633 (2002) (discussing importance of avoiding "premature disclosure of Government witness information"); *United States* v. *Celis*, 608 F.3d 818, 828-837 (D.C. Cir.) (per curiam) (rejecting due process challenge to limits on "[d]isclosure of government witness lists and of exculpatory or impeachment information and evidence" in drug trafficking case in light of "concern about witness security"), cert. denied, 131 S. Ct. 620 (2010).[17] It might be possible in some cases to mitigate the safety risks through use of hearsay evidence at the hearing or other protective measures. But in others, establishing probable cause will inevitably reveal sensitive information.

In this case, petitioners contend (Br. 63), premature disclosure of the government's case is not a serious

---

[17] Between 2006 and 2010, the United States obtained convictions of at least 605 persons for tampering with or retaliating against government witnesses, victims, or informants. See Bureau of Justice Statistics, Federal Criminal Case Processing Statistics, http://bjs.gov/fjsrc/tsec.cfm (reflecting convictions under 18 U.S.C. 1512 (witness tampering) and 1513 (retaliation), but not other provisions under which witness tampering may also be prosecuted such as 18 U.S.C. 1503 (obstruction of justice)); see also Pet. App. 3 (noting that petitioners were charged with obstruction of justice).

concern because the Gruenstrass trial has already taken place. Those idiosyncratic circumstances will not obtain in the mine run of cases in which the government seeks a post-indictment restraint on assets pursuant to Section 853. In any event, however, petitioners are mistaken. The evidence against petitioners is, naturally, not the same as the evidence against Gruenstrauss or other defendants, see, *e.g.*, J.A. 138-139; the government alleges that petitioners were the ringleaders of the scheme for obtaining and reselling millions of dollars in prescription medical devices that belonged to others, and petitioners dealt with various entities and trafficked in various devices that the other defendants did not. See J.A. 52-57; see also, *e.g.*, Docket entry No. 184, at 93-94, 101-102, 148-149, 233-234, 243-244, 271-272; Docket entry No. 185, at 346.[18]

In view of these dangers, the government might, as petitioners suggest (Br. 63), be forced to "elect to forgo interim remedies" altogether to avoid disclosures in particular cases—a result that some defendants would attempt to achieve as a matter of strategy, regardless of the perceived strength or weakness of the government's case. See Jon May, *Attorney Fees and Government Forfeiture*, Champion 20, 23 (Apr. 2010) (publication for criminal defense counsel advising that "[e]ven if defense counsel cannot prevail on the facts or the law, he may be

---

[18] Petitioners' presentation to this Court highlights the ways in which the government might be pressured to disclose a great deal of its case and strategy at an early stage. Based on dispositions as to other defendants, petitioners repeatedly insist (*e.g.*, Br. 10-11, 20-23, 63) that the evidence against them is thin and that the government does not have a viable theory. But petitioners have not yet even been arraigned, and the record does not reflect the government's evidence against them.

able to prevail anyway," because "[s]ometimes the government will decide to give up its restraint on a piece of property rather than engage in litigation that will result in early discovery"). In that event, some defendants would use the unrestrained assets to pay for counsel; some might use them for other purposes, including criminal enterprises, or simply attempt to remove them from the reach of the court. Either way, it might well be that the assets would never be recoverable in the event of a guilty verdict, frustrating Congress's instruction that criminally derived or used assets be forfeited. The government's interest in avoiding such a result is weighty.

3. The value of an adversary evidentiary hearing to revisit the grand jury's probable-cause determination is minimal

Given the important government interests that a hearing on probable cause would impair, that additional procedure would have to be highly effective in avoiding erroneous restraints on assets to justify a ruling that the procedure Congress chose in Section 853 is unconstitutional. But revisiting the grand jury's probable-cause determination would not, in fact, be effective in that way, let alone highly so. To the contrary, a post-indictment, post-restraint hearing addressing guilt would be a "safeguard[]" of little or no value. *Mathews*, 424 U.S. at 334-335.

a. Petitioners' assertion that a hearing would avoid unwarranted restraints of assets is primarily framed as an attack on the reliability of the grand-jury procedure. See Br. 57-59. For all of the reasons given above, however, the Court has justifiably placed a great deal of trust in the grand jury's independence, the thoroughness of its investigation, and its ability to assess the existence of probable cause based on the evidence before

it—which is no doubt why so many serious consequences flow directly from the grand jury's determination. See pp. 29-36, *supra* (distinguishing the procedures at issue in the civil forfeiture cases cited in Br. 57); see also, *e.g.*, Bruce A. Baird & Carolyn P. Vinson, *RICO Pretrial Restraints and Due Process: The Lessons of* Princeton/Newport, 65 Notre Dame L. Rev. 1009, 1026-1027 (1990) (stating that a hearing on likelihood of conviction "can have no genuine function" in light of existing grand-jury determination).[19]

Petitioners nevertheless contend (Br. 57) that the grand jury may err because it has heard only a "one-sided presentation[ ]"—that is, that defendants may be able to come forward with convincing exculpatory evidence that was never before the grand jury. But in the vast majority of cases such evidence will not be sufficiently exculpatory to demonstrate a lack of probable cause. See *Williams*, 504 U.S. at 51-52 (explaining that to determine probable cause "it has always been thought sufficient to hear only the prosecutor's side"). "The grand jury does not sit to determine the truth of the

---

[19] The government's "direct pecuniary interest" in the outcome of a criminal case involving forfeiture (Br. 56 (quoting *Good*, 510 U.S. at 56)) does not decrease the reliability of the grand-jury procedure. The grand jury—the charging body—has no financial stake in the outcome. And this Court has already rejected the notion that a prosecuting agency's receipt of monetary benefit as a result of a successful prosecution taints the decision of a neutral body as to the defendant's guilt. *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 243, 247-249, 250-251 (1980) (distinguishing *Tumey* v. *Ohio*, 273 U.S. 510 (1927)); see also *U.S. Dep't of Justice Overview* 6, available at http://www.justice.gov/jmd/2014summary/pdf/fy14-bud-sum.pdf (data showing that in 2012 only 2.5% of Department of Justice budget was attributable to "credit" from Assets Forfeiture Fund); 28 U.S.C. 524(c); pp. 41-42, *supra*.

charges brought against a defendant, but only to determine whether there is probable cause to believe them true, so as to require him to stand trial." *Bracy* v. *United States*, 435 U.S. 1301, 1302 (1978) (Rehnquist, J., in chambers). This standard—the same nontechnical standard required for an arrest or a search (see *Gerstein*, 420 U.S. at 120)—asks whether the evidence shows a "fair probability" that the defendant has committed an offense, not whether, all things considered, he is likely guilty. *Florida* v. *Harris*, 133 S. Ct. 1050, 1055 (2013); see *Gerstein*, 420 U.S. at 121-122 (contrasting reasonable-doubt and preponderance standards, and emphasizing the reliability of an ex parte determination of probable cause).

Experience demonstrates the unlikelihood that an adversarial hearing will refute probable cause. When pre-*Williams* decisions considered claims that a prosecutor wrongfully failed to present exculpatory evidence at the indictment stage, those claims were almost invariably rejected on the ground that the evidence on which the defendant relied did not negate the probability of guilt. See U.S. Br. at 24 & n.10, *Williams*, *supra* (No. 90-1972) (citing, *inter alia*, *United States* v. *Page*, 808 F.2d 723, 728 (10th Cir.), cert. denied, 482 U.S. 918 (1987)). And in the decades since the Second Circuit sustained the due process claim petitioners make here and authorized post-restraint evidentiary hearings at which the government must show probable cause, see *United States* v. *Monsanto*, 924 F.2d 1186 (2d Cir.) (en banc), cert. denied, 502 U.S. 943 (1991), the government is unaware of even a single case in which a district court, after a hearing, has disagreed with the grand jury's determination.

Indeed, a grand jury's indictment is a highly accurate indicator not just of the probability of guilt but of guilt itself. For more than a decade, over 90% of defendants indicted by a federal grand jury have concluded their cases with a conviction, either by plea or trial verdict. See *United States Attorneys' Annual Statistical Report, Fiscal Year 2012* (*Statistical Report*) 8 (noting that in fiscal year 2012 the figure was 93%). That means that the percentage of defendants deemed not guilty after indictment is (at best) approximately half of the percentage of Social Security disability beneficiaries whose benefits were erroneously terminated in *Matthews*—a case in which this Court found that the risk of an erroneous denial was not high enough to justify additional procedural protection. Compare *Matthews*, 424 U.S. at 346 n.29 (stating that "one must also consider the overall rate of error" and noting an error rate of 12.2%), with *Statistical Report* 8 (noting that only 7% of indictments in cases terminated in fiscal year 2012 ended in a disposition other than conviction). And while an erroneous impairment of counsel for one's defense is a serious matter, even a 10% acquittal rate would not suggest an error in the grand jury's original assessment: a finding of not guilty at trial hardly suggests that the grand jury lacked the evidence to establish the far lower showing of probable cause.

It is of course possible that, despite the many safeguards against unfounded prosecutions, courts might rule in a handful of cases that the evidence at a post-restraint hearing does not rise to the level of probable cause.[20] But a rule that broadly invites defendants to

---

[20] Department of Justice policies, in addition to the grand jury's independent check on prosecutors, make it highly unlikely that many such instances would occur. Although disclosure of exculpatory

challenge pretrial restraining orders based on disagreement with the grand jury's finding of probable cause, on the chance that this would be the rare case in which the government cannot legitimately show probable cause—or perhaps the more frequent case in which the government is unwilling to bear the risks of premature disclosure to establish it—would impose significant burdens on the criminal justice system without sufficient off-setting benefits.

b. In this particular case, petitioners have already been afforded significant procedural protections: not only the grand-jury process, but also the participation of the district court in issuing—and narrowing—the asset-restraint order, see 21 U.S.C. 853(e)(1); Pet. App. 24-25, 98, and an adversarial hearing at which they could have challenged the nexus between the restrained assets and the charged crimes but elected not to do so, Pet. App.

---

evidence to the grand jury is not required under *Williams*, the government's policy is that prosecutors must disclose to the grand jury any substantial exculpatory evidence in their possession. See *United States Attorneys' Manual* 9-11.233 (1997) ("It is the policy of the Department of Justice * * * that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury."). Such a procedure is unquestionably prudent. Prosecutors have little incentive "to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt." *Lovasco*, 431 U.S. at 791. Indeed, federal prosecutors are instructed that, "both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact." *United States Attorneys' Manual* 9-27.220 (1997).

40.[21] A co-defendant's acquittal by a trial jury applying the beyond-a-reasonable-doubt standard says nothing about whether probable cause exists as to petitioners—especially because the evidence against petitioners differs from the evidence presented at that trial. Under those circumstances, the Fifth and Sixth Amendments do not guarantee petitioners an evidentiary hearing at which they may revisit the grand jury's probable-cause determination as a condition of continuing the pretrial restraint of their forfeitable assets.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MYTHILI RAMAN
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ELAINE J. GOLDENBERG
Assistant to the Solicitor General
SONJA M. RALSTON
Attorney

AUGUST 2013

---

[21] In addition, the magistrate judge who issued the restraint here requested and relied on an affidavit submitted by the government (and filed under seal) discussing the evidence against petitioners. See Pet. App. 108-109. Although that procedure is not constitutionally required, it reinforces the conclusion that the government had evidence showing probable cause to believe that petitioners committed the offenses charged. See *Gerstein*, 420 U.S. at 120 (probable cause "can be determined reliably without an adversary hearing").

APPENDIX

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 21 U.S.C. 853 provides:

Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(4) ORDER TO REPATRIATE AND DEPOSIT

(A) IN GENERAL—Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

(B) FAILURE TO COMPLY—Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p) of this section, shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court

shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any

person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under

this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(*l*) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section

without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered

forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(*o*) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

(1) In general

Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant—

(A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property

In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) Return of property to jurisdiction

In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

(q) Restitution for cleanup of clandestine laboratory sites

The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II of this chapter involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall—

(1) order restitution as provided in sections 3612 and 3664 of Title 18;

(2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663A of Title 18.

REPLY BRIEF

RECORD
AND
BRIEFS

No. 12-464

Supreme Court, U.S.
FILED
SEP 30 2013
OFFICE OF THE CLERK

In The
Supreme Court of the United States

KERRI L. KALEY and BRIAN P. KALEY,

Petitioners.

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

HOWARD SREBNICK
Counsel of Record
BLACK, SREBNICK, KORNSPAN & STUMPF, P.A.
201 South Biscayne Blvd., Suite 1300
Miami, FL 33131
(305) 371-6421
HSrebnick@RoyBlack.com

G. RICHARD STRAFER
G. RICHARD STRAFER, P.A.
201 South Biscayne Blvd., Suite 1380
Miami, FL 33131
(305) 374-9091
Richard@RichardStrafer.com

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress
Law Library

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. *Medina* Is Inapplicable	1
II. A Grand Jury's Finding of Probable Cause Is Not "Conclusive" as to Whether a Court May Continue Restraining Property Needed to Retain Counsel of Choice	3
III. The *Mathews* Factors Overwhelmingly Favor a Hearing at Which Defendants May Challenge Probable Cause	14
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES:

Arthur Andersen, LLP v. United States, 544 U.S. 696 (2005) 22

Barker v. Wingo, 407 U.S. 514 (1972) 1

Bellotti v. Baird, 443 U.S. 622 (1979) 14

Boumediene v. Bush, 553 U.S. 723 (2008) 2, 19

Bracy v. United States, 435 U.S. 1301 (1978) 4

Caplin & Drysdale, Chtd. v. United States, 491 U.S. 617 (1989) 15, 17

Cleveland v. United States, 531 U.S. 12 (2000) 22

Clinton v. Jones, 520 U.S. 681 (1997) 14

Costello v. United States, 350 U.S. 359 (1956) 3

County of Riverside v. McLaughlin, 500 U.S. 44 (1991) 7

Crosby v. United States, 506 U.S. 255 (1993) 16

Deck v. Missouri, 544 U.S. 622 (2005) 16

Demore v. Kim, 538 U.S. 510 (2003) 8

FDIC v. Mallen, 486 U.S. 230 (1988) 11

Fellers v. United States, 540 U.S. 519 (2004) 9

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) 9

Franks v. Delaware, 438 U.S. 154 (1978) 6, 18

Fuentes v. Shevin, 407 U.S. 67 (1972) 12

Gerstein v. Pugh, 420 U.S. 103 (1975) 7, 8, 9

TABLE OF AUTHORITIES – Continued

Page

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 16, 24

Harmelin v. Michigan, 501 U.S. 957 (1991).....18

Illinois v. Allen, 397 U.S. 337 (1970) 16

Krimstock v. Kelly, 464 F.3d 246 (2d Cir. 2006).....2

Manning v. Seeley Tube & Box Co. of New Jersey, 338 U.S. 561 (1950).....15

Mathews v. Eldridge, 424 U.S. 319 (1976).....2, 14, 16

McNally v. United States, 483 U.S. 350 (1987) 22

Medina v. California, 505 U.S. 437 (1992) 1, 2

Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).....12

Missouri v. Frye, 132 S.Ct. 1399 (2012).....19

Neder v. United States, 527 U.S. 1 (1999) 22

Patterson v. New York, 432 U.S. 197 (1977) 2

Powell v. Alabama, 287 U.S. 45 (1932).....22

Regalado Cuellar v. United States, 553 U.S. 550 (2008).....22

Reynolds v. United States, 98 U.S. 145 (1878) 16

Skilling v. United States, 130 S.Ct. 2896 (2010).....22

Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969).....12

Tot v. United States, 319 U.S. 463 (1943) 2

Turner v. Rogers, 131 S.Ct. 2507 (2011).....14

United States v. A Parcel of Land (92 Buena Vista Avenue), 507 U.S. 111 (1993).....14, 15

TABLE OF AUTHORITIES – Continued

Page

United States v. Adkinson, 360 F.3d 1257 (11th Cir. 2004) 21

United States v. Aguilar, 515 U.S. 593 (1995) 22

United States v. Aisenberg, 358 F.3d 1327 (11th Cir. 2004), *cert. denied*, 543 U.S. 868 (2004) 21

United States v. Bajakajian, 524 U.S. 321 (1998) 5

United States v. Braunstein, 281 F.3d 982 (9th Cir. 2002) 21

United States v. Bruchhausen, 977 F.2d 464 (9th Cir. 1992) 15

United States v. Burstyn, 878 F.2d 1322 (11th Cir. 1989) 17

United States v. Calandra, 414 U.S. 338 (1974) 4

United States v. E-Gold, Ltd., 521 F.3d 411 (D.C. Cir. 2008) 17

United States v. Elso, 422 F.3d 1305 (11th Cir. 2005) 16

United States v. Gilbert, 198 F.3d 1293 (11th Cir. 1999) 21

United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) 15

United States v. Hosseini, 436 F. Supp. 2d 963 (N.D. Ill. 2006) 15

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

United States v. Lopez-Lopez, 282 F.3d 1 (1st Cir. 2002) 23

United States v. Maldonado, 708 F.3d 38 (1st Cir. 2013) 17

United States v. Mandujano, 425 U.S. 564 (1976) 23

United States v. Monsanto, 491 U.S. 600 (1989) 12, 25

United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991) 8, 17

United States v. Risk, 843 F.2d 1059 (7th Cir. 1988) 13

United States v. Salerno, 481 U.S. 739 (1987) 8

United States v. Santos, 553 U.S. 507 (2008) 22

United States v. Schlieffen, 2008 U.S. Dist. LEXIS 116907, *aff'd*, 2009 U.S. Dist. LEXIS 16843 (S.D. Fla., Mar. 5, 2009) 21

United States v. Velez, 586 F.3d 875 (11th Cir. 2009) 23

United States v. Williams, 504 U.S. 36 (1992) 4

United States v. Williams, No. 90-1972 (Nov. 29, 1991), 1990 U.S. Briefs 1972, 1991 U.S. S.Ct. Briefs LEXIS 653 ..... 4, 5

Zadvydas v. Davis, 533 U.S. 678 (2001) 8

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AND STATUTORY AUTHORITY:

U.S. Const. art. III 5

U.S. Const. amend. I 9, 12

U.S. Const. amend. IV 4, 9, 12

U.S. Const. amend. V 4, 7, 9, 12, 24

U.S. Const. amend. VI 9, 12, 15, 16, 24

18 U.S.C. § 982 5

18 U.S.C. § 1956 5

18 U.S.C. § 1957(f)(1) 23

18 U.S.C. § 3006A 21

21 U.S.C. § 853(e) 5

OTHER AUTHORITIES:

Fed. R. Evid. 804(b)(6) 16

Comment: Airing the Dirty Laundry: The Application of the United States Sentencing Guidelines to White Collar Money Laundering Offenses, 49 AM. U.L. REV. 289 (1999) 20

Duszk, M. Diane, *Post-McNally Review of Invalid Convictions Through the Writ of Coram Nobis*, 58 FORDHAM L. REV. 979 (Apr. 1990) 22

Johnson, Barry L., *The Civil Asset Forfeiture Reform Act of 2000 and the Prospects for Federal Sentencing Reform*, 14 Fed. Sent. R. 98 (Sept./Oct. 2001) 19

TABLE OF AUTHORITIES – Continued

Page

Leipold, Andrew D., *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (Jan. 1995) 20

Roots, Roger, *If It's Not a Runaway, It's Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821 (June 2000) 23

Statistical Tables for the Federal Judiciary, Table D-4, U.S. District Courts – Criminal Defendants Disposed of, by Type of Disposition and Offense During 12-Month Period Ending Dec. 31, 2012 20

Stillman, Sarah, *Taken: Under Civil Forfeiture, Americans Who Haven't Been Charged with Wrongdoing Can Be Stripped of Their Cash, Cars, and Even Homes. Is That All We're Losing?*, The New Yorker, Aug. 12, 2013 19

ARGUMENT

For six years, the government has urged the courts below to apply the speedy trial test in *Barker v. Wingo*, 407 U.S. 514 (1972), to determine the Kaleys' due process rights. In this Court, the government abandons that position. Government's Brief ("GB"):36, n.10. Instead, the government proposes that *Medina v. California*, 505 U.S. 437 (1992), provides the appropriate framework, GB:18-21; that a grand jury's finding of probable cause is "conclusive" *for all purposes* until trial, GB:21-37; and that the Kaleys should be denied any adversarial judicial review because some other hypothetical defendants might, in the future, abuse the proposed procedural safeguards. GB:44, 47. The Court should reject these arguments, which seek to deprive defendants of the right to be heard and the right to counsel of choice.

I. *Medina* Is Inapplicable

For the first time in this case, the government urges the Court to use the test in *Medina*, 505 U.S. at 445, to analyze what the government characterizes as an "attack" by the Kaleys on "the unreviewable character of the grand jury's probable cause determination." GB:19. *Medina* addressed a due process challenge to a *state* rule of criminal procedure (regarding the burden of proof in competency hearings), thus touching on "principles of federalism that are not implicated in this case." Amicus Brief for Institute for Justice 18, n.35. Moreover, *Medina* involved the

procedures used ***during*** a state criminal proceeding, not the "deprivation of property ***pending*** a criminal proceeding." *Krimstock v. Kelly*, 464 F.3d 246, 254 (2d Cir. 2006) (emphasis added) (rejecting *Medina* in analyzing due process right to a hearing when the state seizes an automobile incident to arrest as an instrumentality of the crime charged). Thus, this Court in *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993), applied the test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), not *Medina*, to address the due process implications of seizing, without a hearing, real property alleged to have facilitated criminal activity. *See also Boumediene v. Bush*, 553 U.S. 723, 781-83 (2008) (applying *Mathews* to test the process due in military tribunals).

Even under *Medina*'s test, the Kaleys prevail. "The legislature cannot 'validly command that the finding of an indictment . . . should create a presumption of the existence of all the facts essential to guilt.'" *Patterson v. New York*, 432 U.S. 197, 210 (1977) (quoting *Tot v. United States*, 319 U.S. 463, 469 (1943)). The absence of any meaningful and timely opportunity to be heard and challenge the basis of a court order restraining property they need to employ counsel of choice "'offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina*, 505 U.S. at 445 (quoting *Patterson*).

II. A Grand Jury's Finding of Probable Cause Is Not "Conclusive" as to Whether a Court May Continue Restraining Property Needed to Retain Counsel of Choice

Having mischaracterized the Kaleys' claim as an attack on the "quintessential and historic feature of the criminal justice system," GB:19, the government's brief is largely devoted to attacking a straw man – that the Kaleys are challenging the "centuries-old rule that the grand jury provides the appropriate procedure for deciding whether probable cause exists" to return an indictment. GB:36. But the Kaleys are not objecting to the grand jury's authority to indict them. Nor are they objecting to the district court relying on the indictment to enter a ***temporary*** restraining order before hearing from them. Rather, the Kaleys are objecting to the district court continuing to restrain their property until trial despite a demonstrably defective theory of prosecution. They are objecting to a procedure that requires a court to restrain their assets and thereby deprive them of counsel of choice – while declining to consider unrebutted evidence of their innocence.

The Constitution envisioned that the grand jury's finding of probable cause would be used for a single purpose – to initiate felony criminal prosecutions. *See generally Costello v. United States*, 350 U.S. 359, 409 (1956) ("An indictment . . . is enough to call for trial of the charge on the merits."). The Court has insulated a grand jury's deliberations from pretrial challenge to ensure that the grand jury can fulfill its limited

constitutional function as an "accusatory" body, not an "adjudicative" one. *United States v. Williams*, 504 U.S. 36, 51 (1992). *Accord United States v. Calandra*, 414 U.S. 338, 349 (1974) ("Because the grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial."); *Bracy v. United States*, 435 U.S. 1301, 1302 (1978) (Rehnquist, Circuit Justice) ("The grand jury does not sit to determine the truth of the charges brought against a defendant, but only to determine whether there is probable cause to believe them true, *so as to require him to stand his trial. Because of this limited function*, we have held that an indictment is not invalidated by the grand jury's consideration of hearsay . . . or by the introduction of evidence obtained in violation of the Fourth Amendment. . . .") (emphasis added; citations omitted).

When the government seeks to use a grand jury's accusatory finding to insulate a restraining order from judicial review, it is taking the proverbial fish out of water. The Fifth Amendment authorizes grand juries to return only indictments, not injunctions. Once an indictment is returned, the grand jury has "completed its essential function." *See* Brief for the United States, *United States v. Williams*, No. 90-1972 (Nov. 29, 1991), 1990 U.S. Briefs 1972, 1991 U.S. S.Ct. Briefs LEXIS 653, at *27. The court, not the grand jury, then exercises its power by entering an order restraining property. The court, not the grand

jury, must then provide the property owner due process of law.

The purpose for which the government seeks to use the grand jury's finding here – the preservation of assets subject to an *in personam* forfeiture action – is one that the Founding Fathers most certainly never intended. They so disdained English *in personam* "forfeiture of estate" penalties that they banned them in the Constitution for the crime of treason. *See* U.S. Const., art. III, § 3, cl. 2. The First Congress in 1790 then extended the ban to *all* felonies. *See United States v. Bajakajian*, 524 U.S. 321, 328 n.7 (1998) (citation omitted). It was not until 1970 that Congress resuscitated the *in personam* forfeiture penalty for organized crime and major drug trafficking; not until 1984 that these laws authorized ex parte pretrial restraining orders (*e.g.*, 21 U.S.C. § 853(e)); and not until 1992 that Congress permitted forfeitures for money laundering (18 U.S.C. § 982), a crime that was not codified until 1986 (*see* 18 U.S.C. § 1956). If requiring a grand jury to consider exculpatory evidence would be a "distortion of the grand jury's traditional responsibility," Brief for the United States, *United States v. Williams*, 1991 U.S. S.Ct. Briefs LEXIS 653, at *27, surely, then, permitting the government to use the grand jury's finding to restrain a defendant's assets – for a purpose that was banned in 1790, for a crime that was not codified until 1986 and for a punishment that was not authorized until 1992 – would be an even greater "distortion" of that "traditional responsibility." *See generally* Amicus Brief for Gun

Owners Fnd., *et al.* 5-7; Amicus Brief for Cal. Attorneys for Crim. Justice 4-9. Moreover, the government is proceeding under a facilitation theory of forfeiture to restrain the Kaleys' home, which "differs not only in degree, but in kind, from its historical antecedents." *Good,* 510 U.S. at 82 (Thomas, J., concurring in part and dissenting in part).

Paraphrasing Chief Justice Rehnquist's dissent in *Good*, 510 U.S. at 67-68, the government portends a "legal cognitive dissonance" where "the defendant might simultaneously be told that probable cause exists to believe that he committed a crime for purposes of proceeding to trial . . . but no probable cause exists to believe that he committed a crime for purposes of restraining his assets." GB:34. The "integrity of the criminal justice system" is not "jeopardize[d]," and "the public's confidence in the criminal proceedings" is not "damage[d]," GB:34, when a judge makes a ruling reflecting his/her own judgment, based on the facts and legal arguments presented in open court, even one that seemingly conflicts with the grand jury's. To the contrary, it highlights the independence of the judiciary. Routinely, district courts examine whether the government had sufficient evidence of probable cause to obtain search warrants and wiretaps. Grand jury indictments are never "conclusive" on that question. *Cf. Franks v. Delaware*, 438 U.S. 154, 170 (1978) (rejecting government's argument that "a post-search hearing will confuse the issue of the defendant's guilt," recognizing that "[a]n issue extraneous to guilt already is examined in any

probable-cause determination or review of probable cause"). A greater threat to the "integrity of the criminal justice system" and "the public's confidence in the criminal proceedings" is a rule of law that obligates a judge to rubber stamp a (government-drafted)[1] protective order restraining a defendant's assets based solely on a secret, one-sided grand jury proceeding that the judge did not observe.

The government's reliance on *Gerstein v. Pugh*, 420 U.S. 103 (1975), for the proposition that a grand jury's finding of probable cause must be "conclusive on the issue of probable cause" for purposes beyond limited post-arrest detention, GB:21-22, is, as this Court explicitly stated, "misplaced." *Good*, 510 U.S. at 50. In *Gerstein*, a civil class action lawsuit, the Court held that prompt ***non-adversarial*** judicial review is sufficient to protect a just-arrested defendant's Fourth Amendment rights. *See also County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) ("[J]udicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*."). *Gerstein* did not address the Fifth Amendment implications of continuing the detention through trial (much less the restraint of assets, whether for counsel or otherwise).

---

[1] Together with its first ex parte motion for a protective order, the government submitted a proposed order for the judge to sign, which he did. *Compare* DE 5-1 (proposed order) *with* DE 6 (signed order).

In *United States v. Salerno*, the Court did, upholding pretrial detention where the statutory scheme contained "extensive safeguards," including an adversarial hearing, which "far exceed[ed] what we found necessary to effect *limited post-arrest detention* in *Gerstein v. Pugh*." 481 U.S. 739, 752 (1987) (emphasis added). Those additional "safeguards" were essential to the Court's holding. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("government detention violates [] [the Due Process] Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections. . . .") (citing *Salerno*); *Demore v. Kim*, 538 U.S. 510, 549-550 (2003) (Souter, J., dissenting) ("In deciding [] *Salerno* . . . it was crucial that the statute provided that, 'in a full-blown adversary hearing, the Government must convince a neutral decisionmaker. . . . '"); *id.* at 577 (Breyer, J., dissenting) ("Kim's constitutional claims to bail in these circumstances are strong.") (citing Justice Souter's opinion approvingly). The procedural safeguards include "a pretrial hearing at which the presiding judge is explicitly mandated to consider, *inter alia*, 'the weight of the evidence against the person' in reaching a bail determination . . . ***a reconsideration of the evidence previously weighed by the grand jury, and thus of its probable cause determination***." *United States v. Monsanto*, 924 F.2d 1186, 1194 (2d Cir. 1991) (en banc) (emphasis added).

Pretrial detention cases abound in which courts independently weigh the evidence supporting an

indictment to determine the strength of the government's case, *see* Amicus Br. Cal. Attorneys for Crim. Justice 10-18, even if "only insofar as it sheds light on whether the defendant is likely to flee (because the case against him is so strong) or presents a danger to the community." GB:26. No case cited by the government precludes the court from considering exculpatory evidence and, doubting the defendant's guilt, ordering release on bail, the grand jury's seemingly contradictory probable cause "finding" notwithstanding.

There is no anomaly in observing that the Fourth Amendment permits the arrest of a defendant without adversarial judicial review while the Fifth Amendment thereafter guarantees an adversarial hearing to determine whether the defendant should be released before trial. *See Good,* 510 U.S. at 50 (rejecting the government's assertion, based on *Gerstein*, that "the Fourth Amendment provides the full measure of process due under the Fifth."). Indeed, the Court has frequently found that a result unavailable under one constitutional right may be obtainable under another. *See, e.g., Fellers v. United States*, 540 U.S. 519, 523-24 (2004) (suppressing statements under Sixth Amendment despite finding no Fifth Amendment violation); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989) (requiring more than "probable cause" to justify seizure of allegedly pornographic books because the books were "presumptively protected by the First Amendment").

Pretrial restraint of assets may prove more damaging to a defendant, particularly in the long-run, than pretrial detention of limited duration. Detention does not prohibit the defendant from using his life's savings to employ counsel and fund his legal defense. In contrast, a protective order restraining a defendant's property for that same limited duration can forever deprive the defendant of his counsel of choice at the trial that will determine whether he gets his property (and freedom) back. No doubt, incarceration – even mere accusation – can affect a defendant's finances. particularly his ability to earn future income. GB:26-27. However, before the reincarnation of *in personam* forfeitures, the filing of an indictment never justified taking from the defendant his *already-earned* property. When the government seeks to "assert ownership and control over the [defendant's] property itself," the government's conduct "must comply" with due process. *Good*, 510 U.S. at 52.

The government's argument creates its own anomalies. In *Good*, the defendant, whose property was seized pursuant to a forfeiture action, had *already pled guilty* to drug offenses. Yet, this Court held that he was still entitled to a *pre*-seizure probable cause hearing. The Kaleys have not pled guilty; they are contesting the charges but, in the government's view, they are barred from challenging probable cause at a *post*-restraint hearing because the grand jury returned an indictment.

That an indictment "may establish grounds for suspending the employment of employees in regulated industries," GB:27, does not establish probable cause for other purposes or insulate it from challenge. Thus, the government overstates the significance of *FDIC v. Mallen*, 486 U.S. 230 (1988), about a bank officer whose employment was summarily suspended upon indictment for lying to the FDIC. GB:27 & n.8. The Court was satisfied that the existence of an indictment "demonstrate[d] that the suspension [was] not arbitrary," *id.* at 244, and thus a sufficient basis to initiate the suspension – just as an indictment is sufficient to initiate the ex parte restraining order affecting the Kaleys' property. But within a "brief period" of time, *id.* at 241, the banker would receive a post-suspension hearing at which he could make an "extensive evidentiary record" challenging the suspension. The Court did not suggest that the grand jury's finding of probable cause was immune from challenge or that it would carry any weight or preclusive effect at the *post*-suspension hearing. Nor was there any indication that the suspension and corresponding loss of income had *any* impact on his criminal case.

The hearing demanded by the Kaleys would cause no violence to the grand jury's historic function of initiating prosecutions. The hearing would not look back; it would not require the district court to examine the evidence presented to the grand jury in 2007. The hearing would focus exclusively on the evidence the government can marshal and present to the

district judge at the time the post-indictment hearing is convened. The government would need to establish "the probable validity of the underlying claim," *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972) (quoting *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 343 (1969) (Harlan, J., concurring)), *i.e.*, "the probability that [its] case [would] succeed." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 609 (1974).[2] If the government fails to meet its burden, the judge would modify the protective order to allow the Kaleys to use their property to fund their legal defense, including retaining counsel of choice. Meanwhile, the indictment would remain intact.

---

[2] Notwithstanding what the Kaleys submit is *dicta* in *United States v. Monsanto*, 491 U.S. 600, 615 (1989) (government may "restrain property . . . based on a finding of probable cause"), the Kaleys have urged that the government must establish a "substantial probability" that the government will prevail. Petitioner's Merits Brief ("PMB") 25, 32; JA 106, 122. Given the constitutional rights at stake, there are powerful reasons why the burden should be higher than mere probable cause. *See* Amicus Brief for NACDL 12 ("The restraint of the Petitioners' assets implicates the Fourth, Fifth, Sixth, and First Amendments. . . . The seizure is a meaningful interference with [the Petitioners'] possessory interests in their assets . . threatens their structural right to the assistance of their counsel of choice. . . . denies an individual his right to speech, denies society access to that speech, and depletes the marketplace of protected ideas . . . [because] legal advocacy (particularly against the government) constitutes political speech. Thus, a seizure that threatens to irremediably deny a defendant his right to counsel of choice is constitutionally unreasonable when it is supported by only probable cause.").

The task is simplified in this case because the government already developed a complete record upon which the district court can rule: The trial of the acquitted co-defendant Gruenstrass. Although the government repeats the prosecutor's assertion below that the government did not present at the Gruenstrass trial all the evidence it had against the Kaleys, GB:9, n.3, no proffer of such additional evidence was made, not even *in camera*, so far as the record reflects. In any event, the government does not need more evidence; it needs a viable theory of prosecution. *See United States v. Risk*, 843 F.2d 1059, 1061 (7th Cir. 1988) ("The district court . . . correctly dismissed the indictment, not because the government could not prove its case, but because there was no case to prove").

The government concedes that an indictment "invalid on its face" is subject to pretrial challenge, but asserts that the Kaleys have not made such an argument. GB:30. Actually, they did: Ever since the government announced its defective theory of "property" in its bill of particulars, DE 74-75, and during co-defendant Gruenstrass's trial, PMB:22-23 (citing DE 187:842-43), the Kaleys have argued that the charges were not only factually unsupported but also legally invalid under binding precedent. JA 79, 106-29. The Kaleys also argued that the government had constructively amended the indictment by shifting its theory of prosecution from hospital-as-owner to employer-as-owner. JA 80-81, 144-45. The government persuaded the courts below that they did not

have the power to modify the protective order, so the courts never ruled on the legal challenges.

III. The *Mathews* Factors Overwhelmingly Favor a Hearing at Which Defendants May Challenge Probable Cause

Although the application of the *Mathews* test usually results in "categorical" rulings, *see, e.g., Turner v. Rogers*, 131 S.Ct. 2507, 2520 (2011); *Good*, 510 U.S. at 62. the Court decides cases on their facts, not in a vacuum. "It has long been [this Court's] considered practice not to decide abstract, hypothetical or contingent questions." *Clinton v. Jones*, 520 U.S. 681, 690 n.11 (1997) (citation omitted). The practical reason for this rule is that "a real case or controversy may well present questions that appear quite different from the hypothetical questions. . . ." *Bellotti v. Baird*, 443 U.S. 622, 656 n.4 (1979) (Rehnquist, C.J., dissenting). Thus, the government cannot casually dismiss the circumstances of this case as "idiosyncratic," GB:46, but must argue the constitutional point "with reference to the particular facts to which it is to be applied." *Clinton*, 520 U.S. at 690 n.11.

In the battle between the Kaleys and the government over the property rights at stake, there is no contest. The Kaleys have been convicted of nothing and, therefore, they are still "genuinely the 'owner[s]'" of their home. *See United States v. A Parcel of Land (92 Buena Vista Avenue)*, 507 U.S. 111, 134 (1993) (Scalia, J., concurring). The government does

not own the property now and may never. Thus, this is not a case like *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617, 621 (1989), in which the lawyers wanted to be paid from assets the defendant agreed to forfeit *after* pleading guilty to drug charges. By then, the government's title to the assets had vested. *See Buena Vista*, 507 U.S. at 126.[3] At most, the government has a contingent "right to forfeit," which is "too ethereal" to constitute a property right. *United States v. Bruchhausen*, 977 F.2d 464, 467 (9th Cir. 1992); *see also United States v. Hosseini*, 436 F. Supp. 2d 963, 965-67 (N.D. Ill. 2006) (dismissing portion of indictment pretrial based on theory that the government had "'[a]n intangible right to a possible future forfeiture. . . .'").

The Kaleys' property rights are entitled to great weight, regardless of what they propose to do with their property. *See* Amicus Brief for Institute for Justice 3, 26-33. That the Kaleys need immediate access to their property to fund their legal defense and employ counsel heightens their interest. After all, the Sixth Amendment right to counsel of choice is structural. *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

---

[3] The Court's tax precedents are distinguishable for similar reasons. Under *Manning v. Seeley Tube & Box Co. of New Jersey*, 338 U.S. 561, 565-66 (1950), the government's right to unpaid taxes is deemed to vest at the moment the taxes accrue.

The government tries to mitigate the significance of the Sixth Amendment by referring to it as only a "qualified" right and foreshadowing abuses by defendants if the restraining order were modified. GB:47 ("[S]ome defendants would use the unrestrained assets to pay for counsel; some might use them for other purposes, including criminal enterprises, or simply attempt to remove them from the reach of the court."). But the possibility that a right might be abused by some does not justify denying that right to all.[4] "[I]n the *Mathews* calculus, we consider the interest of the *erroneously* detained individuals," *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality op.) (citation omitted; emphasis in original), not the interest of someone found abusing the right in question.

Courts, and the government itself, are fully capable of policing potential abuses. Attorneys who launder proceeds of their clients can be prosecuted and incarcerated. *E.g., United States v. Elso*, 422 F.3d 1305 (11th Cir. 2005). Attorneys who disobey court orders or improperly disrupt the trial proceedings

---

[4] For example, defendants have the right to be present at trial and confront witnesses but may forfeit those rights by fleeing the jurisdiction after trial has commenced, *see Crosby v. United States*, 506 U.S. 255, 259 (1993), or by intimidating witnesses, *Reynolds v. United States*, 98 U.S. 145 (1878); Fed. R. Evid. 804(b)(6). In rare circumstances, a disruptive defendant may even be bound and gagged, *see Illinois v. Allen*, 397 U.S. 337, 344 (1970), but the extraordinary need to do so in one case does not justify shackling defendants in all cases. *See Deck v. Missouri*, 544 U.S. 622 (2005).

may be held in contempt. *E.g.*, *United States v. Burstyn*, 878 F.2d 1322, 1326 (11th Cir. 1989). Defendants who change counsel to delay the trial are denied continuances. *E.g.*, *United States v. Maldonado*, 708 F.3d 38 (1st Cir. 2013). Just as "[t]he Constitution does not forbid the imposition of an otherwise permissible criminal sanction, such as forfeiture, merely because in some cases prosecutors may abuse the processes available to them," *Caplin*, 491 U.S. at 634-65, the due process right to a hearing is not foreclosed merely because other defendants or their attorneys "may abuse the processes available to them. . . ." *Id.*

The government's exaggerated fears about "mini-trials," "premature disclosure" and "safety of witnesses," GB:15, 44-45, are belied by the historical record of the past 25 years.[5] *See* Amicus Brief for New York Council of Defense Lawyers. In 2008, when pressed at oral argument by the District of Columbia Circuit, "the government could not identify any harm to its law enforcement efforts in the Second Circuit that has resulted from the *Monsanto* standard." *United States v. E-Gold, Ltd.*, 521 F.3d 411, 419 n.1 (D.C. Cir. 2008). As in the suppression hearing context, courts are well equipped to police potential

---

[5] As authority for the proposition that defense attorneys will abuse the process to get a sneak peak at discovery, the government cites to itself – the views of the then-acting Deputy Chief of the Asset Forfeiture and Money Laundering Section of the Department of Justice in one of the four articles he published in 2004 promoting the Department's litigation positions.

abuses. *Cf. Franks*, 438 U.S. at 170 ("The requirement of a substantial preliminary showing would suffice to prevent the misuse of a veracity hearing for purposes of discovery or obstruction."). For their part, the Kaleys agreed to proceed based on the record the government created by insisting on trying co-defendant Gruenstrass first, as well as the plea and sentencings transcripts of two "co-conspirators." JA 84. No witness safety concerns have been suggested in this "white collar" case.

Preserving funds for restitution, GB:41, surely is not driving the government's aggressive pursuit of the Kaleys' assets. No "victim" has surfaced in the seven-plus years since the Kaleys were first told that they were under investigation for allegedly stealing the devices. Actually, the prosecutor conceded in the case of another sales representative that "we can't make restitution" because the products could not be traced to any specific hospitals. PMB:11. The restraint of assets is primarily based on a facilitation ("involved in"), not a proceeds, theory of forfeiture, in which only the government stands to benefit from forfeiting the equity in the Kaleys' home.

The government's "direct pecuniary interest in the outcome of the proceeding," *Good*, 510 U.S. at 56 – admittedly to fund its own operations, GB:42 – is a more compelling reason to *grant* hearings, not to deny them. *See* Amicus Brief for Institute for Justice 33-37. "It makes sense to scrutinize government action more closely when the State stands to benefit." *Harmelin v. Michigan*, 501 U.S. 957, 979, n.9 (1991) (opinion of

Scalia, J.). Given that "[v]irtually every federal investigative agency and prosecuting authority has a significant financial stake in the success of the government's two forfeiture funds, . . . a timely adversary hearing is necessary to provide the requisite neutrality and due process that is missing from a prosecution-driven ex parte process." Amicus Brief for FACDL 26, 28 (collecting data).[6]

The risk of erroneous fact-finding also weighs heavily in the Kaleys' favor. The hallmarks of due process – the right to be present and the opportunity to be heard – do not apply to grand jury proceedings. They are "'closed and accusatorial'" proceedings, so "even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal's findings of fact." *See Boumediene*, 553 U.S. at 785 (citation omitted).

The government tries mightily to bolster the reliability of grand juries by citing a 93% conviction rate in 2012. GB:50. But "97 percent of federal convictions . . . are the result of guilty pleas," *Missouri v. Frye*, 132 S.Ct. 1399, 1402 (2012), "many of which are

---

[6] Reported abuses by the government of its forfeiture power was a major impetus for the enactment of forfeiture reform legislation in 2000. *See* Barry L. Johnson, *The Civil Asset Forfeiture Reform Act of 2000 and the Prospects for Federal Sentencing Reform*, 14 Fed. Sent. R. 98 (Sept./Oct. 2001). Yet, the abuses keep mounting. *See* Sarah Stillman, *Taken: Under Civil Forfeiture, Americans Who Haven't Been Charged with Wrongdoing Can Be Stripped of Their Cash, Cars, and Even Homes. Is That All We're Losing?*, The New Yorker, Aug. 12, 2013.

the result of a bargain between the prosecution and defense that some charges will be reduced or dropped." Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 276-77 (Jan. 1995). The resulting guilty plea will then mask whether "the grand jury simply accepted the prosecutor's recommendation on the higher charge even though the evidence would only support a lesser offense." *Id.* at 277.[3] Moreover, ***of defendants who did not plead guilty in 2012, the conviction rate was a dismal 21%.*** Statistical Tables for the Federal Judiciary, Table D-4, U.S. District Courts – Criminal Defendants Disposed of, by Type of Disposition and Offense During 12-Month Period Ending Dec 31, 2012.[4]

Although admitting that it is "conceivable that an adversary hearing may expose a lack of probable

---

[3] Money laundering cases are particularly susceptible to abuse. *See Comment: Airing the Dirty Laundry: The Application of the United States Sentencing Guidelines to White Collar Money Laundering Offenses*, 49 AM. U.L. REV. 289 (1999).

[4] According to the table, in 2012 the government "disposed of" 95,281 defendants, of whom 84,974 pled guilty, leaving 10,307 who did not plead guilty. Of those, 1,959 were convicted by a jury, 183 convicted by a judge, a total 2,142 convictions, for a conviction rate of 21%. The remaining 8,165 defendants (79%) were not convicted, either because they were acquitted at trial or their case was dismissed. For money laundering defendants who did not plead guilty, the conviction rate was 24%; for transportation of stolen property defendants, 28%. http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2012/december/D04Dec12.pdf.

cause," the government argues that a hearing to "winnow out the needle in the haystack cannot be found to be constitutionally compelled, given its serious costs." GB:15-16. To mix metaphors, the government can only make such an argument by keeping its head buried in the haystack. In 1997, Congress enacted the Hyde Amendment, 18 U.S.C. § 3006A, waiving sovereign immunity to permit attorney fee awards for vexatious prosecutions. Despite the "daunting burden" of having to prove *both* bad faith *and* the lack of probable cause in order to win fee awards, *United States v. Gilbert*, 198 F.3d 1293, 1302-03 (11th Cir. 1999), published examples of vexatious prosecutions are not hard to find: *E.g., United States v. Aisenberg*, 358 F.3d 1327 (11th Cir. 2004) (affirming award for $1,494,650.32), *cert. denied*, 543 U.S. 868 (2004); *United States v. Adkinson*, 360 F.3d 1257 (11th Cir. 2004) (affirming award for $100,169.75 where government indicted defendants on a fraud theory that was contrary to Eleventh Circuit precedent); *United States v. Schlieffen*, 2008 U.S. Dist. LEXIS 116907 (Magistrate's Report awarding $356,824), *aff'd*, 2009 U.S. Dist. LEXIS 16843 (S.D. Fla., Mar. 5, 2009);[9] *United States v. Braunstein*, 281 F.3d 982, 996 (9th Cir. 2002) (remanding to award fees to a defendant prosecuted for fraud and money laundering where

---

[9] Mr. Schlieffen served seven years in prison before the government's misconduct was discovered and his case was dismissed but he died before he could collect the award. *Schlieffen*, 2008 U.S. Dist. LEXIS 116907, at **4-5.

"the government's position was so obviously wrong as to be frivolous," particularly because "[a]ll of this [exculpatory] information was in the AUSA's possession prior to her decision to seek a grand jury indictment. . . .").

Furthermore, this Court has been called upon to intervene on multiple occasions to halt misguided theories of prosecution alleging crimes similar to those with which the Kaleys are charged: ***fraud***, *e.g.*, *Skilling v. United States*, 130 S.Ct. 2896 (2010); *Cleveland v. United States*, 531 U.S. 12 (2000); *Neder v. United States*, 527 U.S. 1 (1999); *McNally v. United States*, 483 U.S. 350 (1987); ***money laundering***, *Regalado Cuellar v. United States*, 553 U.S. 550 (2008); *United States v. Santos*, 553 U.S. 507 (2008); and ***obstruction of justice***. *E.g.*, *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005); *United States v. Aguilar*, 515 U.S. 593 (1995). These rulings prompted countless coram nobis petitions belatedly undoing the damage to the wrongfully convicted. *See generally* M. Diane Duszk, *Post-McNally Review of Invalid Convictions Through the Writ of Coram Nobis*, 58 FORDHAM L. REV. 979 (Apr. 1990).

The ease with which prosecutors are able to secure such indictments is no surprise given that grand jurors are ordinary citizens with "small and sometimes no skill in the science of law" and are "incapable, generally, of determining for [themselves] whether the indictment is good or bad." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (citations omitted). Prosecutors admit of no obligation to school

grand jurors on the elements of (or defenses to) the crimes for which they have been asked to indict. *See United States v. Lopez-Lopez*, 282 F.3d 1, 9 (1st Cir. 2002). Without guidance from a judge, grand juries will indict even when the undisputed conduct does not violate the statute. *E.g.*, *United States v. Velez*, 586 F.3d 875, 876 (11th Cir. 2009) (attorney indicted for money laundering for engaging in "monetary transactions made for the purpose of securing legal representation" which the appellate court concluded were "exempt from criminal penalties under [18 U.S.C.] § 1957(f)(1).").[10]

The limitations of grand juries to serve as a shield against "reckless or unfounded charges," *United States v. Mandujano*, 425 U.S. 564, 571 (1976), is underscored by this case. The grand jury foreperson did not sign the initial indictment, which sought a forfeiture judgment of $2.2 million on a "proceeds" theory when, as the prosecutors later conceded, they could only trace $140,000. PMB:7-8. When it became clear that the court was going to limit the restraint to $140,000, it took only *two business days* for prosecutors to convince a grand jury to re-indict the Kaleys for the new charge of money laundering despite no evidence of concealment. PMB:20. When forced to identify the purported owner of the allegedly stolen

---

[10] The grand jury's power to bring presentments was abolished in 1946 when the Federal Rules of Criminal Procedure were adopted. *See* Roger Roots, *If It's Not a Runaway, It's Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821, 830-33 (June 2000).

property, the government constructively amended the indictment by naming a different owner, JA 74-75, than the one(s) identified earlier in the proceedings. PMB:8-11. That disclosure exposed a fatal defect in the theory of prosecution. PMB:21-22.

CONCLUSION

What the government seeks is an unreviewable veto power over the exercise of a constitutionally protected structural right. *See* Amicus Brief for American Bar Association 16 ("These harms to both the reality and the appearance of fairness of the criminal justice system are all the more striking because, absent a meaningful pretrial adversarial hearing, the full power to decide whether to intrude into a defendant's choice of counsel -- and when to do so – is controlled by the prosecution."); Amicus Brief for CATO Institute 12 (warning that "prosecutors can use forfeiture to strategically disarm the defense."). If, in the government's view, the Kaleys are denied the attorneys who have been championing their cause for over six years, too bad. And if the Kaleys are convicted after having been represented by other counsel, on appeal the conviction will be relied upon as an affirmation that the government was right all along. The Court should be wary of "an unchecked system," *Hamdi*, 542 U.S. at 530, where irrebuttable presumptions favoring the government "interfere[ ] with a defendant's Sixth Amendment right to counsel of choice, and the guarantee afforded by the Fifth Amendment's Due

Process Clause of a 'balance of forces' between the accused and the Government." *Monsanto*, 491 U.S. at 614.

The judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

HOWARD SREBNICK
Counsel of Record
BLACK, SREBNICK, KORNSPAN & STUMPF, P.A.
201 South Biscayne Blvd., Suite 1300
Miami, FL 33131
(305) 371-6421
HSrebnick@RoyBlack.com

G. RICHARD STRAFER
G. RICHARD STRAFER, P.A.
201 South Biscayne Blvd., Suite 1380
Miami, FL 33131
(305) 374-9091
Richard@RichardStrafer.com

Counsel for Petitioners

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

JUL 2013

No. 12-464

In the Supreme Court of the United States

KERRI L. KALEY AND BRIAN P. KALEY,
PETITIONERS

v.

UNITED STATES OF AMERICA,
RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION *AS AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Of Counsel:
JERROLD J. GANZFRIED
TERRANCE G. REED
JOHN F. STANTON

LAUREL G. BELLOWS
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, IL 60610
(312) 988-5000
abapresident@americanbar.org

Counsel for Amicus Curiae

Library of Congress
Law Library

QUESTION PRESENTED

When a post-indictment, ex parte restraining order freezes assets needed by a criminal defendant to retain counsel of choice, do the Fifth and Sixth Amendments require a pretrial, adversarial hearing at which the defendant may challenge the evidentiary support and legal theory of the underlying charges?

TABLE OF CONTENTS

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 8

DUE PROCESS REQUIRES A MEANINGFUL OPPORTUNITY TO OPPOSE A RESTRAINING ORDER THAT IMPEDES EXERCISE OF A DEFENDANT'S SIXTH AMENDMENT RIGHT TO RETAIN COUNSEL OF CHOICE 10

A. An adversarial hearing to challenge an ex parte restraiing order is essential to protect a defendant's constitutional rights and to safeguard our adversarial system of criminal justice 10

B. When a defendant challenges a pretrial restraining order that precludes her from retaining counsel of her choice, the trial court should ensure that any deprivation of her Sixth Amendment right to counsel of choice satisfies substantive and procedural constitutional standards. 16

C. Due Process precedent requires that defendants be afforded the opportunity for a pretrial adversarial hearing. 19

CONCLUSION 25

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Bell v. Wolfish,
441 U.S. 520 (1979) 22

Caplin & Drysdale v. United States,
491 U.S. 617 (1989) 6, 12, 16

Granny Goose Foods, Inc. v. Brotherhood of Teamsters,
415 U.S. 423 (1974) 24-25

Ibn-Tamas v. United States,
407 A.2d 626 (D.C. 1979) 13

Libretti v. United States,
516 U.S. 29 (1995) 22

Mathews v. Eldridge,
424 U.S. 319 (1976) 19, 20

Padilla v. Kentucky,
130 S.Ct. 1473 (2010) 5

Powell v. Alabama,
287 U.S. 45 (1932) 17, 21

Rompilla v. Beard,
545 U.S. 374 (2005) 5

Strickland v. Washington,
466 U.S. 668 (1984) 5

Taylor v. Kentucky,
436 U.S. 478 (1978)..... 21

United States v. Davila,
133 S. Ct. 2139 (2013)..... 12

United States v. Dortch,
696 F.3d 1104 (11th Cir. 2012)..... 21

United States v. E-Gold,
521 F.3d 411 (D.C. Cir. 2008)..... 24

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006)..... 12, 17

United States v. James Daniel Good Real Prop.,
510 U.S. 43 (1993)..... 19, 20, 21, 23

United States v. Laura,
607 F.2d 52 (3d Cir. 1979)..... 11

United States v. Monsanto,
491 U.S. 600 (1989)..... 6, 12, 16, 24

United States v. Parcel of Land, Building, Appurtenances and Improvements Known as 92 Buena Vista Avenue, Rumson, New Jersey,
507 U.S. 111 (1993)..... 22

Wardius v. Oregon,
412 U.S. 470 (1973)..... 23

Wheat v. United States,
486 U.S. 153 (1988)..... 17

Winkler v. Keane,
7 F.3d 304 (2d Cir. 1993) 13, 14

STATUTES AND RULES

18 U.S.C. § 3142(f)(2)(B) 24

Fed. R. Civ. P. 65 ..... 9, 24

OTHER AUTHORITIES

Dawn Cartwright, *Constitutionality Without Wisdom:* Caplin & Drysdale *and* Monsanto *Examined*, 17 HASTINGS CONST. L.Q. 659 (1990) 15

Lawrence J. Fox, Susan R. Martyn, Andrew S. Pollis, eds., *A CENTURY OF LEGAL ETHICS* 20 (ABA 2009) 4

Geoffrey C. Hazard, Jr., & Susan P. Koniak, *The Law and Ethics of Lawyering* (1990) 11

Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence* 23 Crim. Just. 10 (Winter 2009) .. 4

Pamela Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670 (1991) 14

Stefan D. Cassella, *Criminal Forfeiture Procedure: An Analysis of Developments in the Law Regarding the Inclusion of a Forfeiture Judgment in the Sentence Imposed in a Criminal Case*, 32 AM. J. CRIM. L. 55 (2004) 10

Lindsey N. Godfrey, *Rethinking the Ethical Ban on Criminal Contingent Fees: A Commonsense Approach to Asset Forfeiture*, 79 TEX. L. REV. 1699 (2001) 14

Sand, et al., Modern Federal Jury Instructions, Criminal ¶ 3.01[1] 21-22

ABA General Information, *available at* http://www.americanbar.org/groups/leadership/delegates.html 3

ABA MODEL RULES OF PROFESSIONAL CONDUCT 2

ABA Model Rule 1.5(d) 3

ABA Model Rule 1.5(d)(2) 11

ABA Model Rule 1.7 3

ABA Model Rule 1.7(b) 12

ABA CANONS OF PROFESSIONAL ETHICS (1908) 2, 4

ABA STANDARDS FOR CRIMINAL JUSTICE 4-5, 12, 13

ABA Policy #108 A (August 1985) 5, 7

ABA Policy #125 (August 1986)..... 5, 7

ABA Policy #133A (February 1996) 6

INTEREST OF THE *AMICUS CURIAE*[1]

The American Bar Association ("ABA") submits this brief in support of petitioners Kerri L. Kaley and Brian P. Kaley. Although the ABA takes no position on the merits of their case, the ABA respectfully asserts that, in any criminal case in which an ex parte restraining order has been entered that freezes assets needed by defendants to retain counsel, an adversarial pretrial hearing that provides a meaningful opportunity to challenge the evidentiary support and underlying probable cause for such an order is essential to protect the defendants' Fifth Amendment Due Process rights and their Sixth Amendment right to retain their counsel of choice.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from all fifty states and other jurisdictions, and include attorneys in law firms, corporations, non-profit organizations, and government agencies, and in the offices of prosecutors, public defenders and private defense counsel. Members also include judges,

---

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

legislators, law professors, law students, and nonlawyer associates in related fields.[2]

Since its founding in 1878, the ABA has worked to protect the rights guaranteed by the Constitution, including the rights of criminal defendants to Due Process and to retain counsel. An integral part of this work has been the promotion of the competence, ethical conduct and professionalism of lawyers – whether they are defense counsel or prosecutors – as they balance their responsibilities to their clients, to the legal system, and to their own interests in making a living.

Of particular relevance to the importance of a trial court's early determination of the appropriateness of an ex parte restraining order are considerations of a lawyer's ethical responsibilities when representing a defendant whose assets needed to pay the lawyer have been frozen. These considerations are embodied in the ABA MODEL RULES OF PROFESSIONAL CONDUCT ("ABA Model Rules").[3] Although authority for lawyer regulation is

---

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council before filing.

[3] The ABA Model Rules are *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

vested primarily in the courts of a lawyer's licensing jurisdiction, the ABA Model Rules provide a national framework for professional competence and ethical conduct.[4] As discussed in the ABA's Argument, *infra*, ABA Model Rules 1.5(d)[5] and 1.7[6] address a

---

First adopted as ABA policy in 1908 as the CANONS OF PROFESSIONAL ETHICS, they have been continuously amended and updated through the efforts of ABA members, national, state and local bar organizations, academicians, practicing lawyers, and the judiciary. A Model Rule becomes ABA policy only after it is approved by the ABA House of Delegates, which is composed of 560 delegates representing states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, ABA members, and the Attorney General of the United States, among others. *See* ABA General Information, *available at* http://www.americanbar.org/groups/leadership/delegates.html.

[4] Except for California, each State and the District of Columbia has adopted a version of the ABA Model Rules and its numbering system. California is in the process of amending its Rules of Professional Conduct but its proposed Rules do not follow the ABA Model Rules format. In addition, the highest courts of the United States Virgin Islands and American Samoa have stated that lawyer conduct in their territories is governed by the ABA Model Rules. The state rules of professional conduct are *available at*: http://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest.html.
A comparison of individual ABA Model Rules with each of the state rules can be found at:http://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html.

[5] ABA Model Rule 1.5(d) states, in pertinent part: "A lawyer shall not enter into an arrangement for, charge, or collect:
(2) a contingent fee for representing a defendant in a criminal case."

[6] ABA Model Rule 1.7 states, in pertinent part: "[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest [which] exists if: . . .(2) there is a

lawyer's conduct when such an ex parte order creates a conflict of interest by converting the lawyer's representation to a contingency fee matter, in which payment is dependent on whether the defendant is found not guilty at trial or the frozen assets are otherwise returned to the defendant. The principles on which these rules are based provided guidance for lawyer conduct well before they were incorporated into the ABA's 1908 CANONS OF PROFESSIONAL ETHICS.[7]

These same considerations are reflected in the ABA STANDARDS FOR CRIMINAL JUSTICE ("Criminal Justice Standards"),[8] and specifically, in Standard 4-

---

significant risk that the representation of one or more clients will be materially limited by a personal interest of the lawyer."

[7] *See, e.g.*, Lawrence J. Fox, Susan R. Martyn, Andrew S. Pollis, eds., A CENTURY OF LEGAL ETHICS 20 (ABA 2009) (chart tracing lawyer conflicts of interest principles from 1824 case law through 2008 ABA Model Rules).

[8] The ABA CRIMINAL JUSTICE STANDARDS and a history of their development are *available at* http://www.americanbar.org/groups/criminal_justice/policy/standards.html. *See also* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 14-15 (Winter 2009) (describing the process by which the Standards are developed and promulgated). They have been developed and revised by the ABA Criminal Justice Section, working through broadly representative task forces made up of prosecutors, defense lawyers, judges, academics, and members of the public and other groups with a special interest in the subject. Like the ABA Model Rules, they must be approved by vote of the ABA House of Delegates before they become ABA policy.

3.3.[9] Begun in 1964 under the aegis of then-ABA President (and later Justice) Lewis Powell, the Criminal Justice Standards do not purport to establish a constitutional baseline for effective assistance of counsel, *see Rompilla v. Beard*, 545 U.S. 374, 399 (2005) (Kennedy, J., dissenting), but have been recognized by this Court as "valuable measures of the prevailing professional norms of effective representation." *Padilla v. Kentucky*, 130 S.Ct. 1473, 1482 (2010). *See also Strickland v. Washington*, 466 U.S. 668, 688 (1984)) ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what [performance of counsel] is reasonable").

These concerns also led the ABA to adopt policies in 1985 and 1986,[10] which then provided the

---

[9] Standard 4-3.3(f) states: "Defense counsel should not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case."

[10] In ABA Policy #108A (adopted August 1985), the ABA objected to the use of the forfeiture provisions of the Comprehensive Crime Control Act of 1984 to issue subpoenas to attorneys representing criminal defendants, in the absence of reasonable grounds to believe that an attorney has engaged in criminal conduct and/or has accepted a fee as a fraud or sham to protect the illegal activity of a client. In ABA Policy # 125A (adopted August 1986), the ABA objected to the use of statutory forfeiture provisions in pretrial and other orders to prevent a defendant from paying counsel of choice or other expenses incident to presenting an effective defense, in the absence of reasonable grounds to believe the payments constitute a sham, fraud, or criminal conduct. Both policies are available on request from the ABA.

basis for its amicus brief in *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989), and *United States v. Monsanto*, 491 U.S. 600 (1989).[11] In that amicus brief, the ABA stated (at *4-5): "Besides the risk of non-payment, defense counsel would confront ethical rules against accepting representation in which payment is contingent upon the outcome of trial. The government can demonstrate no countervailing interest sufficiently compelling to justify this substantial infringement on the defendant's constitutional right to choose counsel."[12]

Finally, in June 2013, having concluded that the question now before the Court goes directly to a defendant's right to retain counsel of choice and the preservation of an adversarial criminal justice system through the availability and effectiveness of counsel, the ABA adopted a policy specifically urging that courts provide a pretrial adversarial hearing where a criminal defendant can challenge the evidentiary support and underlying probable cause for a restraining order that freezes assets needed to

---

[11] The ABA amicus brief is available at 1989 WL1127836 (U.S.).

[12] *See also*, ABA Policy #133A (adopted February 1996) (adopting thirteen general principles developed by the ABA's Criminal Justice Section, based on its study of federal and state forfeiture laws, of which Principle 5 provides that, to protect the due process interests of defendant property owners, a court should require that the government prove by a preponderance of admissible evidence that the target property qualifies as forfeitable under the applicable federal or state statute), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/1996_my_113a.authcheckdam.pdf.

retain counsel.[13] As noted in the report that accompanied the 2013 policy, a restraint of assets intended for payment of counsel by a defendant who remains presumed innocent at the pretrial stage, should "trigger extra and significant procedural safeguards for the citizen and his property." Report at 7, quoting *United States v. Kaley*, 579 F.3d 1316, 1331 (11th Cir. 2012) (Edmondson, J., concurring).

Based on this long and considered examination of the relationship between the legal profession's obligations to defendants accused of crime and the federal and state forfeiture statutes, the ABA offers this amicus brief to assist the Court in considering the issues of due process and the right to retain counsel of choice that are presented in the case now before the Court.

---

[13] This 2013 policy, because of its recent adoption, is available only on request from the ABA. In time-sensitive situations where action is needed before the House of Delegates meets, the ABA's Board of Governors is empowered to adopt policy that is consistent with prior policy. *See* ABA General Information, *supra* at n.3. As stated in its supporting report, the 2013 policy builds on ABA Policy #108A (adopted August 1985) and ABA Policy #125A (adopted August 1986).

SUMMARY OF ARGUMENT

When prosecutors seek an ex parte pretrial restraining order freezing assets that a defendant needs to pay counsel of choice, the restraining order is a concern not only for the defendant, but for counsel, the courts and the criminal justice system. If there is no pretrial adversarial hearing at which the defendant can contest the evidentiary support and probable cause determination for the restraining order, the defendant's counsel must continue the representation pro bono or must withdraw, because the freezing of assets will have caused the attorney-client relationship to be converted into a contingency fee arrangement prohibited by the attorney ethical rules of every jurisdiction in the United States. Because the right to retain counsel of choice is a "structural" right, a pretrial hearing is essential to protect against the erroneous deprivation of the defendant's constitutional rights; and it is also essential to protect the criminal justice system against the effects of an erroneously created contingent fee representation.

An erroneous deprivation of a defendant's Sixth Amendment right to select and be represented by counsel of choice is a constitutional violation that requires no additional showing of prejudice to make the violation complete. Although such a violation may be avoided by providing the defendant with a pretrial hearing at which the defendant may contest the evidentiary support and probable cause determination for the restraining order, there is no longer a way to restore the structural right once the

trial has been held. Further, where property rights are concerned, even when unaccompanied by a Sixth Amendment right to retain counsel of choice, this Court's due process precedents require an opportunity to be heard at a meaningful time and manner. When protecting a defendant's Sixth Amendment right to retain counsel of choice is involved, the need for a timely, meaningful adversarial pretrial hearing is even more compelling. That is, defendants are presumed innocent until convicted and the prosecution has no justification for punishing a defendant prior to conviction. The federal forfeiture laws confer title on the government only at final judgment, and a pretrial adversarial hearing provides an appropriate balance for the prosecution's otherwise unfettered ability to decide when to request an ex parte order freezing assets. At the pretrial adversarial hearing, the focus will be on whether the government can provide evidentiary justification for its request that assets be frozen and not on the grand jury's determination of probable cause to bring the underlying indictment. And the prosecution and defense will have symmetrical concerns about what pretrial disclosures to make. Whatever the outcome of the hearing, the prosecution will remain free to press the charges in the indictment.

Finally, courts are familiar with the calculus for decision provided by Rule 65 of the Federal Rules of Civil Procedure. This calculus can provide a framework both where property rights are not accompanied by a Sixth Amendment right to retain counsel of choice, and where they are. As this Court

has explained, limitations on ex parte restraining orders involving property rights reflect the fact that our jurisprudence runs counter to the notion of court action taken without affording both sides reasonable notice and the opportunity to be heard. When a defendant's Fifth and Sixth Amendment rights to retain counsel of choice are involved, those rights should be entitled to no less protection.

ARGUMENT

DUE PROCESS REQUIRES A MEANINGFUL OPPORTUNITY TO OPPOSE A RESTRAINING ORDER THAT IMPEDES EXERCISE OF A DEFENDANT'S SIXTH AMENDMENT RIGHT TO RETAIN COUNSEL OF CHOICE.

A. An adversarial hearing to challenge an ex parte restraining order is essential to protect a defendant's constitutional rights and to safeguard our adversarial system of criminal justice.

When an indictment charges an offense for which a defendant's assets may be subject to forfeiture upon conviction, it is now routine for the government to seek a pretrial ex parte order restraining those assets. *See* Stefan D. Cassella, *Criminal Forfeiture Procedure: An Analysis of Developments in the Law Regarding the Inclusion of a Forfeiture Judgment in the Sentence Imposed in a Criminal Case*, 32 AM. J. CRIM. L. 55, 56 (2004).

Although a defendant is presumed innocent and retains title to presumptively legitimate assets, a pretrial order that restrains assets needed to pay counsel of choice will preclude the defendant from retaining and paying that counsel at a critical time. Indeed, selection of counsel may be the most important contribution a defendant makes to her defense. *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979) (citing *Faretta v. California*, 422 U.S. 806 (1975); *Brooks v. Tennessee*, 406 U.S. 605 (1972)).

The pretrial freezing of assets is a concern not only for the defendant, but for counsel, the courts and the criminal justice system. Without an adversarial pretrial hearing at which the defendant can contest the evidentiary support for the restraining order, the assets needed by the defendant to retain counsel of choice may be restored only on acquittal. After the assets are frozen, the defendant's counsel must agree to continue the representation pro bono or must withdraw. Otherwise, the attorney-client relationship would be transformed into a contingency fee arrangement that is dependent on the outcome at trial, in violation of the attorney ethics rules in every State.[14] As ABA Model Rule 1.5(d)(2) states, "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a

---

[14] *See* note 4, *supra* (listing website for state rules of professional conduct and website with comparison of individual ABA Model Rules to each of the state rules). *See also* Geoffrey C. Hazard, Jr., & Susan P. Koniak, *The Law and Ethics of Lawyering*, 508 (1990) ("All states prohibit contingent fees for the defense of a criminal case").

criminal case"). *See also* ABA Model Rule 1.7(b) (representation barred by conflict where lawyer representation limited by material personal interest); ABA Criminal Justice Standard 4-3.3(f) ("Defense counsel should not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case").

This Court concluded in *Caplin & Drysdale*, 491 U.S. at 634, that the forfeiture statute was not unconstitutional in the context of a post-conviction forfeiture; and in *United States v. Monsanto*, 491 U.S. at 615, that assets could be frozen before conviction. But, the Court expressly left unresolved whether the Constitution requires an adversarial hearing – and the scope of such a hearing – for a defendant to contest a pretrial restraining order that freezes assets needed to pay counsel of choice. *Monsanto*, 491 U.S. at 615 n.10. Moreover, this Court has also concluded more recently that the erroneous deprivation of counsel of choice is a "structural" violation of a defendant's Sixth Amendment right to be "defended by the counsel he believes to be best," for which "[n]o additional showing of prejudice is required to make the violation 'complete.'" *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006). Indeed, the denial of this "structural right" is among "'a very limited class of errors' that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole." *United States v. Davila*, 133 S. Ct. 2139, 2149 (2013) (quoting *United States v. Marcus*, 560 U.S. 258 (2010)).

Because the right to retain counsel of choice is a "structural" right, the ABA asserts, a pretrial adversarial hearing at which a defendant can contest the government's evidentiary support for the restraining order is essential to protect both against an erroneous deprivation of the defendant's Sixth Amendment right, and against the effects of an erroneously created contingent fee representation on the vitality of the criminal justice system.

That is, if the government succeeds in establishing to the trial court's satisfaction that there is an appropriate evidentiary foundation for the restraining order, this will also establish that the defendant's attorney must consider the effects of the restraining order on the attorney's ethical obligations. And, in fact, courts have held that contingent fee arrangements create an actual conflict of interest. *E.g., Winkler v. Keane,* 7 F.3d 304, 307-08 (2d Cir. 1993) (noting that contingent fee created a disincentive for counsel to seek a plea agreement or to pursue mitigating defenses that would have resulted in conviction for a lesser offense); *Ibn-Tamas v. United States,* 407 A.2d 626 (D.C. 1979) (vacating murder conviction where contingent fee arrangement and actions of counsel had "completely ruptured and torn asunder" the attorney-client relationship). *See also* ABA Criminal Justice Standard 4-4.3 Commentary ("In the administration of justice the stakes are high, and thus the danger of abuse resulting from a contingent fee is especially great").

Even in preliminary stages of a case, the potential that the attorney-client relationship will become a contingent fee arrangement can impede the development of the trust needed for effective assistance by defense counsel. In plea bargain negotiations, further, the attorney's potential conflict of interest becomes actual when a defendant is offered the opportunity to plead guilty to a lesser offense that would result in forfeiture of funds to pay counsel. *E.g.*, *Winkler v. Keane*, 7 F.3d at 307-08. *See also* Pamela Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 715-17 (1991) (discussing additional ways contingency arrangements undermine the attorney-client relationship); Lindsey N. Godfrey, *Rethinking the Ethical Ban on Criminal Contingent Fees: A Commonsense Approach to Asset Forfeiture*, 79 TEX. L. REV. 1699, 1700 (2001) (arguing that, "in light of the excessive burdens placed on criminal defendants by the Comprehensive Forfeiture Act, the ethical ban against criminal contingent fees should be lifted," and that "defendants whose assets have been frozen should, with proper supervision and protections, be permitted to contract with attorneys for contingent representation").

Perhaps a defendant's most valuable resource at all stages of the criminal justice process is the guidance and independent judgment of counsel who is intimately familiar with the case. With potential forfeiture, conflicts of interest and perhaps a basis for disqualification, an untested restraining order

can increase the chances that counsel may have to be replaced on the eve of trial, thus posing the risk that substitute counsel may have too little time to prepare for trial. If, on the other hand, the evidence presented at trial establishes that the assets should not have been frozen, it will be too late for the attorney to step back in. Indeed, the importance of unimpeded access to counsel intimately familiar with the nuances of a case multiplies with the complexity of a government investigation and resulting allegations.

Without an adversarial pretrial hearing, compliance with the attorney's ethical obligations may otherwise require that the representation can continue only on a pro bono basis, which will not be financially possible for many attorneys. As a result, attorneys may decline representation even in the early stages of investigation if the allegedly criminal activity could make assets vulnerable to a later restraining order.

When defendants whose assets have been frozen must rely on court-appointed counsel, an additional strain is placed on the already limited resources available for representing the indigent, to the further detriment of the criminal justice system.[15] *See* Dawn Cartwright, *Constitutionality*

---

[15] Although a likely consequence of freezing assets that otherwise would be available to pay retained counsel is that courts will have to appoint attorneys at government expense, a particular defendant who is both restrained from using assets to pay an attorney and – because he retains title to the frozen assets – may be deemed not indigent, and thus ineligible for

Without Wisdom: Caplin & Drysdale *and* Monsanto *Examined,* 17 HASTINGS CONST. L.Q . 659, 693 (1990) ("burden on the system will affect all defendants").

These harms to both the reality and the appearance of fairness of the criminal justice system are all the more striking because, absent a meaningful pretrial adversarial hearing, the full power to decide whether to intrude into a defendant's choice of counsel – and when to do so – is controlled by the prosecution.

The ABA submits that, in addition to a defendant's constitutional rights that are at stake, the negative consequences for defendants, their counsel and the criminal justice system provide compelling reasons to require that a criminal defendant be provided a meaningful pretrial opportunity to test the evidentiary support and probable cause determination on which such a restraining order is based.

B. When a defendant challenges a pretrial restraining order that precludes her from retaining counsel of her choice, the trial court should ensure that any deprivation of her Sixth Amendment right to counsel of choice satisfies substantive and procedural constitutional standards.

---

appointed counsel, may fall into a counsel-deprived limbo that poses even greater constitutional problems.

The Court has long held that the Sixth Amendment guarantees a criminal defendant with the resources the right "to select and be represented by one's preferred attorney." *Wheat v. United States*, 486 U.S. 153, 159 (1988); *United States v. Gonzalez-Lopez, supra; see also Powell v. Alabama*, 287 U.S. 45, 53 (1932). Thus, in *Gonzalez-Lopez*, this Court held that the erroneous deprivation of counsel of the defendant's choice establishes a constitutional violation that necessitates a new trial. 548 U.S. at 146-50.

In describing the contours of the Sixth Amendment protection, the Court observed that the right to counsel "commands ... that the accused be defended by the counsel he believes to be best." *Id.* at 146. But, "[t]he right to select counsel of one's choice, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee." *Id.* at 147-48. Because this aspect of the Sixth Amendment protects the fairness of the adjudicative process, its wrongful denial during that process establishes a constitutional violation for which "[n]o additional showing of prejudice is required to make the violation complete." *Id.* at 146.

Further, this deprivation is "'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received," *id.* at 148, because the "violation occurs *whenever* the

defendant's choice is wrongfully denied." *Id.* at 150 (emphasis in original). Thus, when the deprivation results from an improper pretrial order that freezes assets a defendant needs to retain counsel of choice, it is essential that the Sixth Amendment violation be remedied through a pretrial adversarial hearing at which the defendant is permitted to challenge the evidentiary support and probable cause basis for the order.

Both the defendant whose right is in peril, and the court responsible for protecting that right, have critical interests in preventing – pretrial – an erroneous deprivation. Once the trial has been held, there is no longer any way to restore the structural right that was lost. Even in cases where the defendant receives effective representation from substitute counsel, is acquitted, defeats permanent forfeiture, and has the property restored, the constitutionally-infirm deprivation of choice of counsel cannot be remedied. Where trials culminate in negative outcomes for the defendants, the injury resulting from the constitutional violation may be more obvious, but even a reversal on appeal and a new trial with preferred counsel is not a remedy for the original violation, which could have been avoided altogether. Prevention of avoidable errors also benefits the courts by reducing the number of cases in which retrials are ordered (especially since retrials result in even further delay as newly retained counsel will require sufficient time to prepare for effective representation).

Our system of appellate review encourages the prevention of error at trial through rules for issue preservation that require parties to give trial judges a fair opportunity, in the first instance, to decide issues correctly. A pretrial evidentiary hearing to determine the propriety of a restraining order that may erroneously deprive a defendant of assets needed to retain counsel of choice would serve the added function of protecting the defendant's constitutional rights while assisting the courts in avoiding constitutional violations.

C. Due Process precedent requires that defendants be afforded the opportunity for a pretrial adversarial hearing.

As this Court stated in *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993) ("*James Good*"), the process that is due before a government deprivation of property may be effected is provided in *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), and includes the fundamental requirement of "the opportunity to be heard at a meaningful time and in a meaningful manner."[16] As *Mathews* set out, this requires the balancing of (i) the private interest affected by official action, (ii) the risk of erroneous deprivation from the procedures used and the probable value of additional procedures, and (iii) the

---

[16] In fact, the Eleventh Circuit, in the opinion below, acknowledged: "If we were to apply *Mathews* in this case, the Kaleys would be entitled to a pretrial hearing on the merits of the protective order." Pet. App. 74a.

government's interest, including the administrative burden of additional procedures. *James Good*, 510 U.S. at 53, citing *Mathews*, 424 U.S. at 321. In *James Good*, the procedures employed for the seizure of a home alleged to have been used to facilitate federal drug offenses were found to have been inadequate because they were limited to an ex parte probable cause hearing before a federal magistrate. *Id.* Specifically, this Court held:

> The ex parte preseizure hearing affords little or no protection to the innocent owner. In issuing a warrant of seizure, the magistrate judge need determine only whether there is probable cause to believe that the real property was [used to violate a drug law]. The Government is not required to offer any evidence on the question of innocent ownership or other potential defenses that a claimant might have. Nor would that inquiry, in the ex parte stage, suffice to protect the innocent owner's interests.

510 U.S. at 55 (citations omitted). Nor did the fact that the pretrial seizure of the claimant's real estate was temporary, lasting only until trial, alter this Court's conclusion that the Constitution required an earlier hearing to prevent the temporary deprivation of property. *Id.* at 56 (citing *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991) (pre-judgment attachment statute violates due process absent hearing, bond, and extraordinary circumstances)). As this Court concluded, "'fairness can rarely be obtained by secret, one-sided determination of facts decisive of

rights. . . . No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'" *Id.* at 55, quoting *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 170-172 (1951) (Frankfurter, J., concurring).

The right at issue in *James Good* was solely a property right of an owner — the right of possession prior to a civil forfeiture trial — unaccompanied by a Sixth Amendment right to retain criminal defense counsel. This Court concluded nonetheless that the risk of error from ex parte proceedings warranted a pretrial adversarial hearing. In the criminal pretrial context, the ABA asserts, the need for a timely, meaningful adversarial hearing is even more compelling, as illustrated by the following:

First, pretrial, defendants are presumed innocent. *Taylor v. Kentucky,* 436 U.S. 478, 483 (1978) (describing presumption of innocence as the "'undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law'") (quoting *Coffin v. United States* 156 U.S. 432, 453 (1895)); *Powell,* 287 U.S. at 52 ("However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial"). This presumption of innocence carries through trial, as juries are routinely instructed that

a grand jury indictment is neither evidence nor proof of guilt. *See, e.g., United States v. Dortch*, 696 F.3d 1104, 1109 (11th Cir. 2012); Sand, et al., Modern Federal Jury Instructions, Criminal ¶ 3.01[1] ("I remind you that and indictment itself is not evidence. . . It may not be considered by you as any evidence of the guilt of the defendant").

Second, this Court has held that the government has no justification to punish a defendant prior to trial. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with the due process of law") (citing cases). Nevertheless, the pretrial imposition of criminal forfeiture constitutes punishment within the meaning of the Constitution. *Libretti v. United States*, 516 U.S. 29, 39 (1995) (Congress intended forfeiture to be punishment).

Third, federal forfeiture laws confer title on the government only at final judgment, not before. *See, e.g., United States v. Parcel of Land, Building, Appurtenances and Improvements Known as 92 Buena Vista Avenue, Rumson, New Jersey*, 507 U.S. 111 (1993) ("*Buena Vista*") (holding that common law and statutory relation back doctrine did not operate to divest owner of title prior to final forfeiture judgment).[17] Under this Court's holding in *Buena*

---

[17] Both the plurality and concurring opinions in *Buena Vista* affirm the principle that prior to trial the property owner has

Vista, the government's claim to forfeiture is wholly contingent on obtaining a judgment of conviction and forfeiture under the relation back doctrine embodied in common law and statute. Conversely, in the pretrial context the defendant's title is both vested and subject to the constitutional procedural protections against governmental deprivation.

Fourth, a pretrial adversarial hearing provides an appropriate balance to the government's otherwise unfettered ability to decide when to request an ex parte order freezing assets. Without appropriate review, the government may erroneously deprive a defendant of her counsel of choice and necessitate the designation of court-appointed counsel who likely will be unfamiliar with the facts and may lack experience with the particular criminal statutes at issue. The risk of erroneous deprivation is elevated further in the forfeiture setting because "the Government has a direct pecuniary interest in the outcome of the proceeding" and, therefore, the "purpose of an adversarial hearing is to ensure the requisite neutrality that must inform all government decisionmaking." *James Good*, 510 U.S. at 55-56. Lack of a pretrial adversarial hearing thus disrupts the "balance of forces between the accused and his accuser" upon which due process depends. *Wardius v. Oregon*, 412 U.S. 470, 474 (1973).

---

title and the government does not. *See* 507 U.S. at 124 (plurality); *id.* at 134 (Scalia, J., concurring).

Fifth, a pretrial adversarial hearing that tests the evidentiary basis and probable cause for issuing a restraining order will not undo or undermine a grand jury determination of probable cause for issuing an indictment. Rather, the focus will be on whether the government can provide evidentiary justification for freezing the assets, and not on the grand jury's determination of probable cause to bring the underlying indictment. And decisions about whether, and how much, evidence to disclose at such a pretrial hearing are already made in plea bargain negotiations.[18] Prosecutors make similar decisions in seeking pretrial detention under 18 U.S.C. § 3142(f)(2)(B), under which clear and convincing proof is required to obtain a pretrial detention. In any event, the defense will have its own symmetrical concerns about the pretrial disclosures it decides to make and, whatever the outcome of the hearing, the prosecution will remain free to continue with the same charges pending.

Finally, the calculus for decision at such a pretrial adversarial hearing will be familiar to trial courts. Judge Tjoflat stated in his special concurrence below that this Court's balancing test in *Mathews* contains "constitutional principles [which] are mirrored in the framework of Rule 65 of the Rules of Civil Procedure." Pet. App. 83a. As this

---

[18] As noted by the District of Columbia Circuit, government counsel, during oral argument in 2007, could not identify any harm suffered by the prosecution since the Second Circuit's 1991 *Monsanto* decision requiring adversarial hearings on such restraining orders. *United States v. E-Gold*, 521 F.3d 411, 419 n.1 (D.C. Cir. 2008).

Court has explained, Rule 65's procedural limitations on ex parte restraining orders "reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted to both sides of a dispute." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 439 (1974). When the government has obtained a pretrial ex parte restraining order that would freeze a defendant's assets needed to retain counsel of choice, the ABA asserts, the defendant's rights guaranteed by the Fifth and Sixth Amendments are entitled to no less protection.

CONCLUSION

For the reasons set forth herein, the American Bar Association respectfully requests that the judgment of the Eleventh Circuit be reversed.

Respectfully submitted.

Of Counsel:

JERROLD J. GANZFRIED
TERRANCE G. REED
JOHN F. STANTON

LAUREL G. BELLOWS
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, Illinois 60610
(312) 988-5000
abapresident@americanbar.org

Counsel for Amicus Curiae
American Bar Association

July 8, 2013

AMICUS CURIAE BRIEF

RECORD AND

Supreme Court, U.S.
FILED
JUL 3 - 2013
OFFICE OF THE CLERK

No. 12-464

IN THE

Supreme Court of the United States

KERRI L. KALEY and BRIAN P. KALEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JOHN T. PHILIPSBORN
LAW OFFICES OF JOHN T. PHILIPSBORN
507 Polk Street, Suite 250
San Francisco, CA 94103
(415) 771-3801
JPhilipsbo@aol.com

JOHN B. OWENS
Counsel of Record
DANIEL B. LEVIN
MICHAEL J. MONGAN
EMILY B. VIGLIETTA
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071
(213) 683-9100
John.Owens@mto.com

Counsel for Amicus Curiae

July 3, 2013

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

INTERESTS OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. WHILE CRIMINAL FORFEITURE IS NOW A BROADLY USED TOOL, THE PENALTY IS A RELATIVELY NEW PHENOMENON IN THE UNITED STATES WITHOUT HISTORICAL SUPPORT 4

II. SINCE THE FOUNDING OF THIS COUNTRY, THE GOVERNMENT HAS "SHOWN ITS HAND" IN PRE-TRIAL PROCEEDINGS WHEN SEEKING RELIEF THAT THREATENS CRIMINAL DEFENDANTS' RIGHTS 10

A. The Government Is Required to Demonstrate the Strength of Its Prima Facie Case When Seeking Pre-Trial Detention 11

B. American Courts Have Considered the Weight of the Government's Evidence in Bail Determinations for More Than Two Hundred Years 12

C. In Many Federal Courts, the "Weight of the Evidence" Factor Allows Defendants to Challenge the Government's Evidence on the Ultimate Question of Guilt 14

TABLE OF CONTENTS
(continued)

Page

D. The Government Regularly Makes an Expansive Pre-Trial Evidentiary Showing in the Context of Pre-Trial Motions 19

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Alexander v. United States,
509 U.S. 544 (1993) 4, 5, 7

Austin v. United States,
509 U.S. 602 (1993) 5

Bennis v. Michigan,
516 U.S. 442 (1999) 5

Bigelow v. Forrest,
76 U.S. 339 (1869) 6, 7

Bourjaily v. United States,
483 U.S. 171 (1987) 19, 21, 23

Calero-Toledo v. Pearson Yacht Leasing Co.,
416 U.S. 663 (1974) 6

Caplin & Drysdale, Chartered v. United States,
491 U.S. 617 (1989) 8

Glasser v. United States,
315 U.S. 60 (1942) 20

Harmelin v. Michigan,
501 U.S. 957 (1991) 9

In re Feldberg,
862 F.2d 622 (7th Cir. 1988) 26

In re Grand Jury Subpoena,
419 F.3d 329 (5th Cir. 2005) 25

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Grand Jury Subpoenas,
144 F.3d 653 (10th Cir. 1998) 26

In re Sealed Cases,
754 F.2d 395 (D.C. Cir. 1985) 26

Libretti v. United States,
516 U.S. 29 (1995) 8

Mathews v. United States,
485 U.S. 58 (1988) 23, 24, 25

Miller v. United States,
78 U.S. 268 (1870) 7

Nudd v. Burrows,
91 U.S. 426 (1875) 20

Russello v. United States,
464 U.S. 16 (1983) 7

Sherman v. United States,
356 U.S. 369 (1958) 24

Stack v. Boyle,
342 U.S. 1 (1951) 13

United States v. Aguilera–Meza,
329 F. A'ppx 825, 832 (10th Cir. 2009) 21

United States v. Alston,
420 F.2d 176 (D.C. Cir. 1969) 11

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Baines,
486 F. Supp. 2d 1288 (D.N.M. 2007) 23

United States v. Bajakajian,
524 U.S. 321 (1998) 2, 4, 5

United States v. Barret,
824 F. Supp. 2d 419 (E.D.N.Y. 2011) 29

United States v. Boender,
649 F.3d 650 (7th Cir. 2011) 25, 27, 28

United States v. Caniglia,
CR. 02-188-01, 2002 WL 32351181 (E.D. Pa. Apr. 9, 2002) 17, 18

United States v. Chen,
99 F.3d 1495 (9th Cir. 1996) 26, 27

United States v. Doerr,
886 F.2d 944 (7th Cir. 1989) 20

United States v. Dohm,
618 F.2d 1169 (5th Cir. 1980) 14

United States v. Gonzalez,
700 F.2d 196 (5th Cir. 1983) 21

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006) 2

United States v. Gonzalez–Montoya,
161 F.3d 643 (10th Cir. 1998) 21

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. James,
590 F.2d 575 (5th Cir. 1979) 21

United States v. James Daniel Good Real Prop.,
510 U.S. 43 (1993) 5, 9

United States v. Lee,
208 F.3d 228 (10th Cir. 2000) 15

United States v. Lee,
79 F. Supp. 2d 1280 (D.N.M. 1999) 15

United States v. Lee,
No. 99-CR-1417 (D.N.M. Aug. 31, 2000)..... 16

United States v. Meschino,
10 CR 588-1, 2010 WL 2836359 (N.D. Ill. July 19, 2010) 17

United States v. Monaco,
702 F.2d 860 (11th Cir. 1983) 21

United States v. Motamedi,
767 F.2d 1403 (9th Cir. 1985) 11, 14

United States v. Nichols,
841 F.2d 1485 (10th Cir. 1988) 8

United States v. Padilla-Martinez,
762 F.2d 942 (11th Cir. 1985) 21

United States v. Parker,
848 F.2d 61 (5th Cir. 1988) 14

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Salerno,
481 U.S. 739 (1987) 12

United States v. Shakur,
817 F.2d 189 (2d Cir. 1987) 18

United States v. Tortora,
922 F.2d 880 (1st Cir. 1990) 14

United States v. W. Titanium, Inc.,
No. 08-CR-4229, 2010 WL 4117294 (S.D. Cal. Oct. 18, 2010) 29

United States v. Zolin,
491 U.S. 554 (1989) 25, 26

Upjohn Co. v. United States,
449 U.S. 383 (1981) 25

FEDERAL STATUTES

98 Stat. 1837 (1984) 7

18 U.S.C. § 1963(a)(2) 7

18 U.S.C. § 3142(e)(1) 11

18 U.S.C. § 3142(f) 12

18 U.S.C. § 3142(f)(2)(B) 11

18 U.S.C. § 3142(g)(2) 3, 11

21 U.S.C. § 853(a)(2) 8

TABLE OF AUTHORITIES
(continued)

Page(s)

28 U.S.C. § 2461(c) 8

Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117 4

Bail Reform Act of 1984 11

Comprehensive Criminal Forfeiture Act of 1984 7

Comprehensive Drug Abuse Prevention and Control Act of 1970 7

Confiscation Act of 1862 § 5 6

Judiciary Act of 1789, ch. 20, 1 Stat. 91 12

Pub L. No. 98-473 7

FEDERAL RULES

Federal Rule of Criminal Procedure 12(b)(4)(B) 28

Federal Rule of Criminal Procedure 46 13

Federal Rule of Evidence 104(a) 19

Federal Rule of Evidence 801(d)(2)(E) ..... *passim*

Supreme Court Rule 37.6 1

LEGISLATIVE MATERIALS

H. REP. No. 91-907 (1970) 13

TABLE OF AUTHORITIES
(continued)

Page(s)

S. REP. No. 93-1277 (1974) 20

CONSTITUTIONAL PROVISIONS

U. S. Const. art. III, § 3, cl. 2 4

TREATISES

169 A.L.R. Fed. 615 § 2(a) (2001) 4

3 CHARLES Alan WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 571 (4th ed. 2013) 8

OTHER AUTHORITIES

Alice S. Fisher, *Forward*, U.S. Dep't of Justice, NATIONAL ASSET FORFEITURE STRATEGIC PLAN, 2008-2012 at 3 (2008) 4, 9

Brian Fork, *The Federal Seizure of Attorneys' Fees in Criminal Forfeiture Actions and the Threat to the American System of Criminal Defense*, 83 N.C. L. REV. 205, 209 (2004) 6

Edwin C. Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*, 1 N. ILL. U. LAW. REV. 225, 231 (1980-1981) 6

Frederic L. Borch III, *The Use of Co-Conspirator Statements Under the Rules of Evidence: A Revolutionary Change in Admissibility*, 124 MIL. L. REV. 163, 165-66 (1989) 20

TABLE OF AUTHORITIES
(continued)

Page(s)

U.S. Dep't of Justice, *The Attorney General's Guidelines for Seized and Forfeited Property* (July 1990) 9

Peter Lattman, *For U.S. Attorney's Office, Forfeiture From Crime Pays (Sometimes in Dinosaur Bones)*, N.Y. TIMES, Jan. 1, 2013 9

Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 731 (2011) 12

INTERESTS OF *AMICUS CURIAE*

This brief is submitted on behalf of the California Attorneys for Criminal Justice ("CACJ") as *amicus curiae* in support of Petitioners in *United States v. Kaley*, No. 12-464.[1]

CACJ is a non-profit corporation founded in 1972. It has over 1,700 dues-paying members, primarily criminal defense lawyers. A principal purpose of CACJ, as set forth in its bylaws, is to defend the rights of individuals guaranteed by the United States Constitution. CACJ members are concerned that the Government's position in this case, if accepted, would threaten criminal defendants' rights to due process and adequate assistance of counsel. Because the Government has used criminal forfeiture tools with increasing regularity in recent times, clients of CACJ's members are often confronted with the issues raised by this case. CACJ therefore has particular interest in the Court's resolution of these issues.

CACJ has appeared in this Court as *amicus curiae* on several occasions, and offers its expertise in the instant case to give historical context to the Government's current use of criminal forfeiture and its position that criminal defendants should not be permitted to challenge in pretrial hearings the seizures of funds that would be used to pay for counsel of choice.

---

[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, CACJ states that no counsel for a party authored any part of the brief, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Sixth Amendment guarantees a defendant the right to counsel of his or her choice, so long as he or she has the funds to pay that counsel. *See, e.g.*, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146-48 (2006). According to the Government, however, when an indictment alleges forfeiture against a defendant's funds, the defendant may not spend that money to pay for counsel of choice. *See* Brief for the United States at 16-17, filed Feb. 13, 2013 ("Gov't Br."). Under the Government's reading of the law, the only recourse to challenge these forfeiture allegations is to go to trial without the very money necessary to retain counsel of choice to make that challenge.

The Government justifies this position as follows: permitting a defendant "to challenge the existence of probable cause to believe [he or she] committed the charged offenses would risk the premature disclosure of the government's case and trial strategy." Gov't Br. at 17. In other words, the Government argues that it may deprive someone of one of the Constitution's most important rights—counsel of choice to defend oneself against criminal charges—with mere allegations, because holding otherwise would require the Government to "show its hand" before trial.

The Government's position in this case is wrong for two fundamental reasons. First, it ignores the centuries-old tradition in this country of forbidding *in personam* forfeitures, especially forfeitures based solely on an untested finding of probable cause. As the Court has recognized, "[t]he First Congress explicitly rejected *in personam* forfeitures as punishments for federal crimes, and Congress reenacted this ban several times over the course of two centuries." *United States v. Bajakajian*, 524 U.S.

321, 332 n.7 (1998). Not until 1970 did criminal *in personam* forfeiture become a regular feature of the criminal justice system, and there is no basis to believe that the Framers—who detested the *in personam* actions of the British Crown—would have intended that a defendant's Sixth Amendment rights give way to the Government's desire to fill its coffers through forfeiture.

Second, the Government's position ignores the fact that it routinely "shows its hand" before trial when it wants something. For example, if the Government seeks pre-trial detention for a criminal defendant—something that occurs around the country every day—it must set out the "weight of the evidence against the person," *see* 18 U.S.C. § 3142(g)(2), and the defendant may challenge the Government's evidence of guilt. Such evidentiary hearings can be akin to mini-trials, with witnesses, exhibits, cross-examination, and the like. Similarly, when the Government wishes to introduce certain evidence at trial, such as statements in furtherance of a conspiracy under Federal Rule of Evidence 801(d)(2)(E), it often must prove in a pretrial hearing that such statements are admissible, which necessarily requires the Government to show its evidence of the charged offense before trial. Simply put, the Government often must "make its case" before trial when it wants something, and the desire to deprive a criminal defendant of the funds necessary to pay for counsel of choice warrants a similar contested proceeding.

ARGUMENT

I. WHILE CRIMINAL FORFEITURE IS NOW A BROADLY USED TOOL, THE PENALTY IS A RELATIVELY NEW PHENOMENON IN THE UNITED STATES WITHOUT HISTORICAL SUPPORT

Today, federal prosecutors view criminal forfeiture as a "vital weapon" of the United States Department of Justice. Alice S. Fisher, *Forward*, U.S. Dep't of Justice, NATIONAL ASSET FORFEITURE STRATEGIC PLAN, 2008-2012 at 3 (2008). But it was not always this way. As Justice Kennedy has explained, "forfeiture remedies and penalties are the subject of historic disfavor in our country." *Alexander v. United States*, 509 U.S. 544, 563 (1993) (Kennedy, J., dissenting). Indeed, from the earliest days of the Republic, criminal forfeiture was explicitly banned by both the Framers of the Constitution and the First Congress, *see* U. S. CONST. art. III, § 3, cl. 2 ("[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."); Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117 ("[N]o conviction or judgment . . . shall work corruption of blood, or any forfeiture of estate."), "and Congress reenacted this [statutory] ban several times over the course of two centuries," *United States v. Bajakajian*, 524 U.S. 321, 332 n.7 (1998) (Thomas, J.).

The historic "disfavor" in the American justice system for *in personam* criminal forfeiture appears in sharper relief when compared to the long-used practice of *in rem* civil forfeitures. Forfeitures *in rem* attach to specific property that has been "linked to a violation of the law," 169 A.L.R. Fed. 615 § 2(a) (2001), making such forfeitures "limited in

application to contraband and articles put to unlawful use, or in [their] broadest reach, to proceeds traceable to unlawful activity." *Alexander*, 509 U.S. at 563. Perhaps due to their limited nature, *in rem* forfeitures were the only type of forfeiture in the English system that "took hold in the United States." *Austin v. United States*, 509 U.S. 602, 613 (1993); *see also id.* ("But long before the adoption of the Constitution the common law courts in the Colonies—and later in the states during the period of Confederation—were exercising jurisdiction *in rem* in the enforcement of English and local forfeiture statutes." (internal quotation marks and alterations omitted)). By contrast, criminal *in personam* forfeitures attached to the criminal's person, meaning they were not limited to any specific property and, historically, could extend to any and all of a convicted felon's property. *See Austin*, 509 U.S. at 611-12. Unlike its *in rem* cousin, this unlimited forfeiture tool was "rejected altogether in the laws of this country until very recently." *Bajakajian*, 524 U.S. at 332.[2]

---

[2] Although civil forfeiture has a deep history in the United States, this Court has voiced trepidation over the recent expansion of civil forfeiture statutes. *See Bennis v. Michigan*, 516 U.S. 442, 456 (1999) (Thomas, J., concurring) ("Improperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice."); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 81, 85 (1993) (Thomas, J., concurring in part and dissenting in part) (raising concerns in light of "ambitious modern [forfeiture] statutes and prosecutorial practices," and suggesting that "it may be necessary . . . to reevaluate our generally deferential approach to legislative judgments" in the area of forfeiture).

The reasons for the Founders' hostility to criminal forfeiture resonate today. Criminal forfeiture was a broadly used tool in England, where "[t]he convicted felon forfeited his chattels to the Crown and his lands escheated to his lord," and "the convicted traitor forfeited all of his property, real and personal, to the Crown." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974). But the colonists, who preferred not to forfeit American property to the Crown, distrusted this tool. *See* Edwin C. Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*, 1 N. ILL. U. LAW. REV. 225, 231 (1980-1981). After the American Revolution, however, when the threat of property loss to a distant king no longer worried the Founders, "[c]oncern that innocent heirs would be deprived of their inheritances" may have prompted the explicitly anti-forfeiture constitutional and statutory provisions. *See id.*

The risk that *in personam* forfeitures could unduly punish future generations of a defendant's family is still very real. This concern is reflected in the Confiscation Act of 1862, the one and only criminal forfeiture penalty authorized by Congress prior to 1970. *See* Brian Fork, *The Federal Seizure of Attorneys' Fees in Criminal Forfeiture Actions and the Threat to the American System of Criminal Defense*, 83 N.C. L. REV. 205, 209 (2004). Section 5 of the Confiscation Act of 1862 allowed for the forfeiture of property belonging to Confederate soldiers. But even this extraordinary legislation, adopted at the height of the Civil War, was construed as limiting such forfeitures to the soldiers' life estates. *See Bigelow v. Forrest*, 76 U.S. 339, 352 (1869) ("[T]he act shall not be construed to work a forfeiture of the real estate of the offender beyond his natural life."). Thus limited, this Court found the Confiscation Act constitutional.

See id.; *see also Miller v. United States*, 78 U.S. 268 (1870).

Other than the Civil War statute, *in personam* criminal forfeiture did not become part of the American criminal justice system until 1970, when Congress passed the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Continuing Criminal Enterprise statute. RICO's forfeiture provisions gave law enforcement officials expansive "new weapons" in the fight against crime. *See Russello v. United States*, 464 U.S. 16, 26 (1983). RICO created broad categories of forfeitable property, including not just the property directly linked to the commission of a crime, but any "*interest in*; security of; claim against; or property or contractual right of any kind *affording a source of influence over* . . . any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of [RICO]." 18 U.S.C. § 1963(a)(2) (emphasis added). This Court has called RICO's forfeiture penalties "novel for their punitive character . . . [and] unprecedented sweep." *Alexander*, 509 U.S. at 563.

While RICO's criminal forfeiture provisions were "unprecedented" as originally enacted, the innovation did not stop with that statute. Since the enactment of RICO, Congress has continued to expand the scope of the Federal Government's forfeiture powers. The Comprehensive Criminal Forfeiture Act of 1984 amended the forfeiture provisions of RICO and added *in personam* criminal forfeiture penalties to the Comprehensive Drug Abuse Prevention and Control Act of 1970. *See* Pub L. No. 98-473 (H.J. Res. 648), 98 Stat. 1837 (1984). This Act "expanded the substantive sweep of criminal forfeiture," making criminal

forfeiture an available penalty in "an estimated twenty-five percent of the criminal cases brought in federal court," including not just organized crimes and criminal enterprises, but *all* federal drug felonies. *See United States v. Nichols*, 841 F.2d 1485, 1488 (10th Cir. 1988). Moreover, the Criminal Forfeiture Act "expanded the scope of property subject to forfeiture by including as forfeitable any 'property used, or *intended to be used*' in the commission of a drug offense." *Id.* (quoting 21 U.S.C. § 853(a)(2) (emphasis added)). These changes prompted this Court to warn that "broad forfeiture provisions carry the potential for Government abuse and 'can be devastating when used unjustly.'" *Libretti v. United States*, 516 U.S. 29, 43 (1995) (quoting *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 634 (1989)).

Since the passage of the Comprehensive Criminal Forfeiture Act, the scope of criminal forfeiture has continued to expand. In 2000, Congress enacted a statute that "dramatically expanded the crimes for which criminal forfeiture is available . . . [including] all crimes for which civil forfeiture is authorized." 3 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 571 (4th ed. 2013) (referring to 28 U.S.C. § 2461(c)). The true import of this statute can be understood only when one recognizes that "[c]ivil forfeiture is available for all crimes listed as specified unlawful activity in the money laundering statute, [which includes] over 250 crimes." *Id.* The combined effect of these two statutes "means that criminal forfeiture is now available for almost every crime, including, for example, general mail fraud." *Id.*

The growing influence of criminal forfeiture is not entirely the result of legislative action, for just as

Congress has expanded law enforcement access to criminal forfeiture, so too have federal prosecutors expanded their use of this new tool. According to the Department of Justice, "asset forfeiture has become a vital weapon in the United States' anti-crime arsenal," and the Department is "committed to using the asset forfeiture statutes to the fullest extent possible." Fisher, NATIONAL ASSET FORFEITURE STRATEGIC PLAN at 3. Indeed, the United States Attorney for the Southern District of New York recently described the Government's use of criminal forfeiture as "an important part of the culture . . . and an example of the government being efficient and bringing home the bacon." Peter Lattman, *For U.S. Attorney's Office, Forfeiture From Crime Pays (Sometimes in Dinosaur Bones)*, N.Y. TIMES, Jan. 1, 2013.

The Government has expanded its use of criminal forfeiture in part because this tool serves a revenue-raising function. The United States Attorney General's guidelines regarding forfeited property explicitly state that "produc[ing] revenues" is one of the "primary goals" of the Federal Government's asset forfeiture program. U.S. Dep't of Justice, *The Attorney General's Guidelines for Seized and Forfeited Property* (July 1990). This Court has noted that the Government has a "financial stake in drug forfeiture," *United States v. James Daniel Good Real Property*, 510 U.S. 43, 56 n.2 (1993), and "it makes sense to scrutinize Governmental action more closely when the State stands to benefit." *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991). The Government's financial motivation increases the risk that criminal forfeiture will continue to expand beyond its traditionally limited role and highlights the need for courts to impose reasonable safeguards

when this practice threatens the rights of criminal defendants. The Government's position in this case—which effectively uses forfeiture to separate an innocent defendant from access to the funds necessary to defend himself through counsel of choice—ignores the repeated warnings of our Founders and this Court.

II. SINCE THE FOUNDING OF THIS COUNTRY, THE GOVERNMENT HAS "SHOWN ITS HAND" IN PRE-TRIAL PROCEEDINGS WHEN SEEKING RELIEF THAT THREATENS CRIMINAL DEFENDANTS' RIGHTS

The Government argues that it should not be required to "show its hand" by presenting its evidence on the ultimate issue of guilt in a pretrial forfeiture hearing. This premature disclosure, according to the Government, would undermine its trial strategy and threaten the safety of witnesses. Implicit in this argument is the notion that the Government's strategic interest in concealing its evidence and witnesses before trial trumps the criminal defendant's right to obtain counsel of his or her choice. History is not on the Government's side. Since the earliest days of this Republic, defendants have reviewed and challenged the Government's case in a pre-trial setting when the Government makes requests that place defendants' rights at stake. The deep history of this practice stands in contrast to the Government's assertion that such pretrial challenges would impermissibly disrupt federal prosecutions.

A. The Government Is Required to Demonstrate the Strength of Its Prima Facie Case When Seeking Pre-Trial Detention

In perhaps the strongest example of the Government showing its evidence before trial, federal judges are required to consider the strength of the Government's *prima facie* case when the Government moves a court to detain a criminal defendant pending trial. Under the Bail Reform Act of 1984, a prosecutor seeking pretrial detention must prove that no set of release conditions would prevent the defendant from fleeing the justice system or endangering the community. *See* 18 U.S.C. § 3142(e)(1). The Government must support its contention that the defendant would endanger the community if released by "clear and convincing evidence." 18 U.S.C. § 3142(f)(2)(B). The Bail Reform Act requires the Government to present this evidence at a pre-trial hearing and directs the trial judge to consider a prescribed set of factors when deciding whether to grant the Government's motion. One of these factors is "the weight of the evidence against the person." 18 U.S.C. § 3142(g)(2).

To be sure, the purpose of a detention hearing is not to make a final determination of guilt or innocence, but is instead to measure the risk that a criminal defendant will endanger the public or flee. *See, e.g.*, *United States v. Motamedi*, 767 F.2d 1403, 1408 (9th Cir. 1985); *United States v. Alston*, 420 F.2d 176, 179-80 (D.C. Cir. 1969). Nevertheless, because the strength of the Government's evidence is thought to impact the likelihood that the defendant will flee or endanger the community, courts are required to weigh the strength of the underlying

evidence of guilt. A defendant may challenge the Government's showing in what this Court has described as a "full-blown adversary hearing." *United States v. Salerno*, 481 U.S. 739, 750 (1987). The Bail Reform Act grants defendants the right to counsel at these hearings and provides that defendants may testify in their own behalf; present information by proffer or otherwise; and cross-examine the Government's witnesses. *See* 18 U.S.C. § 3142(f). Although the breadth and depth of the trial court's inquiry into the Government's case varies by jurisdiction, it is not uncommon for the Government to lay its entire case bare in a detention hearing even before the Grand Jury returns an indictment.

B. American Courts Have Considered the Weight of the Government's Evidence in Bail Determinations for More Than Two Hundred Years

There is deep historical support for American judges' modern practice of allowing criminal defendants to review and challenge the Government's case in pre-trial detention hearings. The First Judiciary Act, drafted by the framers of the Eighth Amendment, set forth an early framework for American bail determinations. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 91. This statute provided that bail would always be permitted in non-capital cases. *See id.* In capital cases, judges had discretion to order pre-trial detention without bail after considering "the nature and circumstance of the offense, *and of the evidence*, and the usages of law." *Id.* (emphasis added). Judges were thus permitted to weigh the evidence against the accused when making bail determinations in capital cases. *See* Shima Baradaran, *Restoring the Presumption of Innocence*,

72 OHIO ST. L.J. 723, 731 (2011). This standard was undoubtedly drawn from the practice of English justices of the peace, who had considered "the nature of the charge, character of the accused, and the weight of the evidence" in making bail determinations since the 13th century. H. REP. No. 91-907, at 84 (1970).

In 1944, Rule 46 of the Federal Rules of Criminal Procedure was adopted. The earliest version of this rule restated the First Judiciary Act insofar as it provided that the judge should give "due weight to the evidence" when determining whether to grant bail for defendants charged with capital offenses. *See Stack v. Boyle*, 342 U.S. 1, 4 (1951). This version of Rule 46 also went a step further than the First Judiciary Act in directing the court to weigh the evidence of guilt. In both capital and non-capital cases, the rule provided that judges should set the *amount* of bail in light of "the weight of the evidence against [the defendant]," among other factors. *Id.* at 6 n.3

In 1966, the Federal Bail Reform Act was passed. This statute restated Rule 46 and expanded the factors that judges could consider in releasing an individual on bail. In addition, the 1966 Act allowed judges to consider the "weight of the evidence against the person" in all cases when deciding whether to release a defendant on bail. Although the Bail Reform Act has been amended in other respects since 1966, this provision remains intact today.

C. In Many Federal Courts, the "Weight of the Evidence" Factor Allows Defendants to Challenge the Government's Evidence on the Ultimate Question of Guilt

In courts around the country, the government must shows its evidentiary hand in routine bail and detention hearings. For example, the Fifth Circuit has noted that the "weight of the evidence" factor requires the Government to offer proof that the defendant has committed the charged offense and that the court's resolution of this factor "depends upon the strength of the government's prima facie case" against the accused. *United States v. Dohm*, 618 F.2d 1169, 1174 (5th Cir. 1980); *see also United States v. Parker*, 848 F.2d 61, 62 (5th Cir. 1988) (holding that *Dohm*'s interpretation of the "weight of the evidence" factor was unchanged by the 1984 amendments to the Bail Reform Act).

Likewise, the First Circuit has described this factor as "the weight of the evidence as to guilt or innocence." *United States v. Tortora*, 922 F.2d 880, 884 (1st Cir. 1990). In analyzing this factor, the *Tortora* court noted that "the evidence of . . . guilt is both substantial and credible" and that the Government's case was "based in large part on direct evidence, including tape recordings." *Id.* at 886. The *Tortora* court's analysis of this factor thus demonstrates that the Government had revealed the substance and the format of the evidence that would ultimately be used against the defendant at trial. The Ninth Circuit has also noted that the nature of the "weight of the evidence" inquiry is in fact to consider "the evidence of guilt." *Motamedi*, 767 F.2d at 1408.

A review of district court decisions under the Bail Reform Act demonstrates the extent to which the Government regularly lays its evidence bare at detention hearings. Although the degree of evidence presented by the Government varies from case to case, it is not uncommon for the Government to name its witnesses; present direct testimony; provide physical evidence; or make a detailed proffer of evidence that the Government plans to introduce at trial—exactly the same actions that the Government claims here would "risk the premature disclosure of the government's case and trial strategy." Gov't Br. at 17.

The highly publicized investigation and prosecution of nuclear scientist Dr. Wen Ho Lee exemplifies the Government's willingness to reveal its evidence in pretrial detention hearings. After a massive federal investigation, Lee was accused of downloading classified information related to nuclear weapons in violation of the Atomic Energy Act. Less than three weeks after the indictment was filed, the trial court held a three-day detention hearing. Multiple Government witnesses testified "in detail" about the steps Lee allegedly took to download the classified files and gave their opinions that Lee's conduct was "'inconceivable,'" "'unimaginable,'" and "'nefarious,'" and that there was "absolutely no work-related reason for Dr. Lee to have moved the highly sensitive classified information." *United States v. Lee*, 79 F. Supp. 2d 1280, 1285-86 (D.N.M. 1999), *aff'd*, 208 F.3d 228 (10th Cir. 2000). The Government also presented physical evidence including computer forensic data. *See United States v. Lee*, 208 F.3d 228, *1 n.2 (10th Cir. 2000). After this hearing, the trial judge issued a lengthy written decision detaining Lee pending trial. *Lee*, 79 F. Supp. 2d 1280.

Lee subsequently moved to reopen the detention hearing based on new evidence. In response to this motion, the trial judge held yet another three-day evidentiary hearing at which Lee and the Government again presented live testimony and written declarations setting forth their respective positions regarding Lee's guilt or innocence of the charged offense. *See United States v. Lee*, No. 99-CR-1417 (D.N.M. Aug. 31, 2000) (Docket No. 159). The trial judge commented that there had been "disclosure of considerable additional information" since the first detention hearing, "both voluntarily by the government and also in response to court orders," and that he had read "voluminous files and documents" bearing on the motion to reopen the detention hearing. *Id.* at 2.

At the conclusion of the second evidentiary hearing, the trial judge issued another lengthy decision in which he analyzed the "weight of the evidence" of Lee's guilt. The judge found that "the government has never presented direct evidence that Dr. Lee intended to harm the United States or to secure an advantage for a foreign nation, which are elements of the charged offenses." *Id.* at 9. As a result of this analysis, as well as the court's analysis of the other factors prescribed by the Bail Reform Act, the court found that the Government had failed to meet its burden of proving by clear and convincing evidence that no conditions of release would prevent Lee from endangering the community and the nation. *See id.* at 17.

The Lee saga illustrates the fallacy of the Government's position about prematurely showing its hand in a pre-trial setting. In the Lee case, the Government elected essentially to try its case twice in

the detention hearings, introducing physical evidence and testimony from multiple Government witnesses. It did this despite the allegedly critical national security issues raised by this testimony and evidence. If the Government were capable of showing its hand in the Lee case (which involved the supposed "crown jewels" of national security), it is difficult to fathom how showing its hand in the *Kaley* prosecution would harm the interests of the United States.

Decisions from courts in other circuits demonstrate that the Lee case is not an anomaly. To the contrary, the Government commonly shows its hand in pre-trial detention hearings. For example, in *United States v. Meschino*, 10 CR 588-1, 2010 WL 2836359 (N.D. Ill. July 19, 2010), the Government played audio recordings at the evidentiary hearing and the judge quoted the audio at length in his decision to detain the defendant pending trial. The judge specifically hinged his determination of the "weight of the evidence" factor on the defendant's words and tone in these audio recordings, finding that "the evidence against Mr. Meschino could scarcely be stronger." *See id.* at *6.

Similarly, in *United States v. Caniglia*, CR. 02-188-01, 2002 WL 32351181 (E.D. Pa. Apr. 9, 2002), the district court weighed the evidence adduced at a pre-trial evidentiary hearing regarding the defendant's motion to revoke a pre-trial detention order. The court summarized the Government's evidence in a decision, calling the evidence "very strong." *Id.* at *3. Among the Government's evidence was:

- "testimony of at least two cooperating co-conspirators who purchased drugs from [the defendant]";

- "telephone and alarm company records";

- "secretly recorded conversations [with the defendant]";

- "records indicating that [large quantities of drugs] are unaccounted for at [the defendant's] pharmacy"; and

- "bank records show[ing] . . . more than 100 separate cash deposits [into the defendant's bank account]."

Id.

Although the Government commonly presents its evidence of guilt in the form of a proffer, the extent to which the Government shows its hand in these proffers is no less extreme. In *United States v. Shakur*, 817 F.2d 189, 197 (2d Cir. 1987), for example, the Second Circuit explained that the "weight of the evidence" factor "required the district court to consider evidence proffered by the government which it intends to use at [the defendant's] trial." The court then summarized the extensive evidence set forth in the Government's proffer, which included a detailed description of the structure of the defendant's organized crime family; a transcript of a recorded telephone conversation between the defendant and an informant; and a list of physical evidence that included the defendant's fingerprints on hand-drawn maps of robbery sites and financial ledgers of the organized crime family showing withdrawals by the defendant. *See id.* at 197-98. Based on the experience of *amicus*, such evidentiary showings in unreported detention hearings are not uncommon.

D. The Government Regularly Makes an Expansive Pre-Trial Evidentiary Showing in the Context of Pre-Trial Motions

Bail hearings are but one instance of the Government disclosing its evidence of a charged offense before trial. The Government also shows its hand in the context of various pre-trial motions. For example, the Government commonly makes expansive pre-trial evidentiary showings when attempting to introduce evidence under the "co-conspirator statement" exception to the hearsay rule; when moving to preclude an entrapment defense; and when seeking to obtain communications between an attorney and his or her client under the "crime-fraud" exception to traditional privilege rules.

Rule 801(d)(2)(E) of the Federal Rules of Evidence provides that an out of court statement may be admitted against a criminal defendant if the statement "was made by the party's coconspirator during and in furtherance of the conspiracy." Before admitting a statement under this rule, a judge must be satisfied that there is sufficient evidence that a conspiracy existed between the defendant and the declarant and that the statement was in fact made "during the course and in furtherance of the conspiracy." *Bourjaily v. United States*, 483 U.S. 171, 175 (1987); *see also* Fed. R. Evid. 104(a) ("The court must decide any preliminary question about whether . . . evidence is admissible."). When the conspiracy is itself a charged offense, the court's inquiry reaches the question of guilt or innocence.

Much like detention hearings, the practice of requiring the Government to support co-conspirator

statements with evidence of the conspiracy's existence has a deep history in the United States. Although Rule 801(d)(2)(E) was enacted less than forty years ago, the rule codified a common law hearsay exception that has existed since at least the early 1800s. *See* S. REP. No. 93-1277 (1974).[3]

If a defendant contests the admissibility of an alleged co-conspirator statement on the grounds that there was no conspiracy, the likelihood of obtaining a pre-trial hearing on this issue varies between courts. In many circuits, trial judges may refuse to address this issue before trial in any capacity. For example, although the Seventh Circuit has stated that "holding a full blown pretrial hearing" is one permissible procedure for determining whether a conspiracy exists, trial courts within that circuit are also permitted to simply admit the alleged co-conspirator statements at trial "subject to the government's eventual proof" that the conspiracy exists. *United States v. Doerr*, 886 F.2d 944, 967 (7th Cir. 1989).

---

[3] *See also* Frederic L. Borch III, *The Use of Co-Conspirator Statements Under the Rules of Evidence: A Revolutionary Change in Admissibility*, 124 MIL. L. REV. 163, 165-66 (1989) (before the enactment of Rule 801(d)(2)(E), "[t]he prevailing rule in [federal] courts was that independent evidence of the conspiracy's existence, separate and apart from the proffered co-conspirator's statements, was required as a prerequisite for receiving the statements into evidence"); *Glasser v. United States*, 315 U.S. 60, 74 (1942) (declarations of a co-conspirator were admissible against the accused "only if there is proof aliunde that he is connected with the conspiracy"); *Nudd v. Burrows*, 91 U.S. 426, 438 (1875) ("What proof had been given of the alleged concert and conspiracy on the part of the defendants . . . is to be presumed . . . sufficient to lay the proper foundation as to them for the introduction of the evidence.").

Likewise, the Eleventh Circuit has stated that although pre-trial hearings are an available "tool for the use and assistance of the trial judge," there is no inflexible rule that such a hearing must be held. *United States v. Padilla-Martinez*, 762 F.2d 942, 950 (11th Cir. 1985); *United States v. Monaco*, 702 F.2d 860 (11th Cir. 1983).

Other circuits, however, have articulated a clear preference that trial judges adjudicate the foundational facts relevant to Rule 801(d)(2)(E) in a pre-trial hearing. In a seminal Fifth Circuit case on this issue, the court held that district court judges "should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a coconspirator." *United States v. James*, 590 F.2d 575, 582 (5th Cir. 1979), *cert. denied*, 442 U.S. 917 (1979). The Fifth Circuit subsequently stated that the "optimum method" of requiring such a showing from the Government would be at "a separate hearing out of the jury's presence." *United States v. Gonzalez*, 700 F.2d 196, 203 (5th Cir. 1983). These evidentiary hearings are now referred to as "*James* hearings" and are routinely conducted in the Fifth Circuit as well as the Tenth Circuit, which has repeatedly voiced its "'strong preference'" for *James* hearings. *United States v. Aguilera-Meza*, 329 F. A'ppx 825, 832 (10th Cir. 2009) (quoting *United States v. Gonzalez-Montoya*, 161 F.3d 643, 648-49 (10th Cir. 1998)).

The Government's burden of proof at a *James* hearing is not high. As is the case with other factual questions that must be resolved before admitting evidence, the Government is only required to prove Rule 801(d)(2)(E)'s predicate facts by a preponderance of the evidence. *See Bourjaily*, 483

U.S. at 175. Despite this low burden, however, a review of district court dockets within the Fifth and Tenth Circuits reveals that the Government often voluntarily makes highly detailed proffers in support of motions to admit co-conspirator statements. When the conspiracy that forms the basis of the evidentiary rule is also a charged offense, the Government's detailed proffer amounts to an extravagant pre-trial disclosure of evidence on the ultimate issue of guilt or innocence.

For example, in *United States v. B&H Maintenance & Construction, Inc.*, No. 07-CR-00090-WYD (D. Colo.), the Government filed a 27-page proffer setting forth its theory of the case in great detail. *See* United States' *James* Proffer Pursuant to Rule 801(d)(2)(E), No. 07-CR-00090-WYD (D. Colo. Dec. 12, 2007) (Docket No. 146). Because the charged offense in *B&H Maintenance* was conspiracy to rig bids, the evidence of conspiracy that the Government described went to the heart of the Government's case on the merits. For example, the proffer included:

- The name and proposed testimony of the Government's key witness;

- Detailed facts demonstrating the "existence and operation" of the conspiracy, including key participants;

- Specific construction projects for which the defendants were alleged to have rigged bids; and

- The location and substance of key conversations that formed the basis of the bid rigging charges.

See id. at 6-10.

United States v. Baines, 486 F. Supp. 2d 1288 (D.N.M. 2007), provides another example of the Government making a comprehensive pre-trial presentation of evidence on the issue of guilt in the context of Rule 801(d)(2)(E). The defendant in *Baines* was indicted for conspiracy to possess with intent to distribute marijuana. *See id.* at 1292-93. When the trial judge held a *James* hearing to determine whether to admit certain co-conspirator statements, the Government presented a host of physical evidence and testimony that formed the basis of the charged offense. For example, the Government presented: 1) testimony of two identified witnesses giving a detailed description of the defendants' conspiracy to distribute marijuana; 2) testimony of a Drug Enforcement Administration agent who described an inventory of physical evidence; and 3) a long list of physical evidence, including marijuana and firearms. *See id* at 1294.

The Government often makes a similar evidentiary showing when moving to preclude a criminal defendant from presenting an entrapment defense at trial. Such a motion requires the Government to show that the defendant was predisposed to commit the crime and was not induced to commit the crime by the Government. This Court has described the inquiry as focusing on "whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime." *Mathews v. United States*, 485 U.S. 58, 63 (1988) (quoting *Sherman v. United States*, 356 U.S. 369, 372 (1958)). Proving that the defendant was predisposed and not induced to commit the crime requires the

Government to demonstrate that the defendant transgressed willfully and independently. Such evidence often overlaps with the evidence that the Government intends to use in its case-in-chief.

For example, in *United States v. Hall, Gordon, & Ray*, No. 08-CR-00386 (N.D. Ill.), the Government moved *in limine* to preclude an entrapment defense. In arguing that the defendant had not been induced to commit the crime—which was conspiracy to distribute controlled substances—the Government argued that the defendant had "actively participated in planning [a] home invasion of [a] drug stash house." Government's Consolidated Motions *in Limine* at 6 (Nov. 30, 2008) (Docket No. 63). In support, the Government walked through its evidence of the charged offense. The Government described its evidence of the conspiracy in detail, including providing an undercover agent's anticipated testimony; defendants' post-arrest statements; and reference to three recordings of meetings between the defendant and the informant. *See id.* at 6-8. This practice is common in the Northern District of Illinois. For example, a similar disclosure was made in Government's Motion *in Limine* to Preclude an Entrapment Defense, *United States v. Billingsely*, No. 07-CR-00007 (N.D. Ill. Aug. 6, 2008) (Docket No. 210). In this pleading, the Government quoted extensively from audio recordings of the defendant; described the events of a robbery in detail; and provided the dates of meetings between the undercover agent and the defendant. *Id.* at 5-7.

Likewise, the Government willingly presents its evidence of guilt when seeking to obtain evidence of communications between an attorney and his or her client. Such communications are ordinarily shielded

from disclosure by the attorney-client privilege. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."). There is an exception to this privilege, however, for communications that are made in furtherance of a future crime. *See United States v. Zolin*, 491 U.S. 554, 556 (1989).

A party seeking to invoke this exception must make an evidentiary showing to demonstrate that the communications were in fact made in furtherance of illegal conduct. Because the crime that gives rise to the crime-fraud exception is often the same crime as the underlying charged offense, the evidence presented by the Government in support of its crime-fraud argument tends to overlap with the evidence that will be used at trial. Federal courts agree that in order to invoke this exception, the movant must make a "*prima facie*" showing that the client intended to further an ongoing or future crime through the communications with his or her attorney. *See, e.g., In re Grand Jury Subpoena*, 419 F.3d 329, 346 (5th Cir. 2005); *United States v. Boender*, 649 F.3d 650, 655 (7th Cir. 2011).

Different circuits, however, have offered differing interpretations of the exact level of proof necessary to meet the "prima facie" standard. *See In re Grand Jury Subpoenas*, 144 F.3d 653, 660 (10th Cir. 1998) (citing various standards of proof). While the Seventh Circuit has offered a lenient standard, whereby the proponent of the crime-fraud exception need only present sufficient evidence to "call[] for inquiry," *In re Feldberg*, 862 F.2d 622, 625-26 (7th Cir. 1988), other circuits require a more significant showing. For example, the D.C. Circuit will only invoke the crime-

fraud exception when "[t]he government . . . offers evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud." *In re Sealed Cases*, 754 F.2d 395, 399 (D.C. Cir. 1985).

Despite the low threshold of proof that is necessary to invoke this exception in some circuits, the Government can often be seen making broad presentations of evidence in pre-trial settings to show that a defendant's communications with his or her attorney were intended to further a crime. For example, in *Zolin*, the Government encouraged the trial court to listen to recorded tapes of conversations between the investigation's target and his attorney, arguing that these tapes fell within the crime-fraud exception. To support this assertion, the Government submitted two declarations from the agent investigating the case and a partial transcript of the tapes at issue. *See* 491 U.S. at 558.

Moreover, the Government will often produce evidence beyond mere declarations, such as tangible evidence that goes to the heart of the Government's case. In *United States v. Chen*, 99 F.3d 1495, 1497-98 (9th Cir. 1996), for example, the Government indicted the defendants for "conspiracy, tax evasion, and other crimes" based on the defendants' use of "fake invoices" for imported goods. The Government attempted to subpoena the defendants' attorneys, invoking the crime-fraud exception to defeat the defendants' attorney-client privilege objection. *Id.* at 1498-99. To support its crime-fraud exception claims, the Government submitted an affidavit from a cooperating witness and "copies of blank pre-signed invoices from [the defendants'] supplier, which would facilitate the kind of fraud claimed by the

government." *Id.* at 1503. This evidence went to the heart of the Government's case, and yet it was willingly submitted well before trial.

Finally, it is within the district court's discretion to order additional production of evidence to determine whether the crime-fraud exception applies. For example, in *Boender*, 649 F.3d 651, the Government presented a "detailed proffer" justifying its invocation of the crime-fraud exception in an obstruction of justice case. The obstruction of justice charge was based on the Government's allegation that Boender had fabricated an invoice with the intention of producing it to the Government in discovery. *See id.* at 653 n.2. The Government's proffer set forth the facts supporting this allegation, and the Government's legal theory of the charge, in detail. *See* Motion *in Limine* of the United States to Admit Evidence Concerning Document Production, or in the Alternative, to Conduct *In Camera* Inquiry, *United States v. Boender*, 09-CR-00186, (Feb. 1, 2010 (Docket No. 86) (hereinafter "Boender Proffer"). For example, the proffer included:

- A photocopy of the fake invoice;

- A photocopy of an email from the defendant's attorney in which the attorney conceded that the invoice was fake;

- Proposed testimony of a percipient witness who heard the defendant admit that the invoice was fake; and

- Proposed testimony of an expert witness who had concluded that the invoice was back-dated to appear four years older than it was.

See id. at 7-8 & Exhibits A-B. "[B]ut rather than decide whether the crime-fraud exception applied on the basis of that evidence alone, [the court] ordered an in camera hearing" that was adversarial in nature, *Boender*, 649 F.3d at 658, involving live testimony from the defendant's attorneys in the presence of both the defendant and the Government. *See Boender*, 649 F.3d at 653-54. Tellingly, while the defense objected to this pre-trial hearing, the Government actually recommended it. *See id.* at 655-56; Boender Proffer at 9.

These examples, and many others like them, demonstrate that the Government routinely shows its hand pre-trial when it wants something—to have the defendant detained, to introduce particular evidence, to preclude a defense, or to access certain testimony.[4] A similar showing under these circumstances, where a defendant's right to counsel of choice is at stake, will not unduly undermine federal prosecutions.

---

[4] The Government also has various discovery obligations that require it to disclose key evidence to the defendant before trial. One example is the obligation imposed by Rule 12(b)(4)(B) of the Federal Rules of Criminal Procedure. This Rule provides that the Government must provide the defendant, upon request, with any evidence that it intends to use in its case-in-chief at trial if that evidence could be subject to a motion to suppress. *See United States v. Barret*, 824 F. Supp. 2d 419, 459-60 (E.D.N.Y. 2011). Complying with this requirement often requires the Government to disclose critical evidence well in advance of trial. *See, e.g., United States v. W. Titanium, Inc.*, No. 08-CR-4229, 2010 WL 4117294, at *2-3 (S.D. Cal. Oct. 18, 2010) (reciting a letter, mailed to the defendant more than four months before trial, describing the physical evidence that the Government intended to use at trial).

CONCLUSION

For the reasons stated above and in the petitioners' brief, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

JOHN T. PHILIPSBORN
LAW OFFICES OF JOHN T. PHILIPSBORN
507 Polk Street, Suite 250
San Francisco, CA 94103
(415) 771-3801

JOHN B. OWENS
Counsel of Record
DANIEL B. LEVIN
MICHAEL J. MONGAN
EMILY B. VIGLIETTA
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071
(213) 683-9100
John.Owens@mto.com

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUL 1 - 2013
OFFICE OF THE CLERK

RECORD
AND
BRIEFS

No. 12-464

IN THE
Supreme Court of the United States

KERI L. KALEY AND BRIAN P. KALEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the
Eleventh Circuit

Brief of the Cato Institute as *Amicus Curiae* in Support of Petitioners

---

ILYA SHAPIRO
Counsel of Record
Cato Institute
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

JULY 1, 2013

Library of Congress
Law Library

QUESTION PRESENTED

When a post-indictment restraining order freezes assets needed by a criminal defendant to retain counsel of choice, do the Fifth and Sixth Amendments require a pre-trial hearing at which the defendant may challenge the evidence and legal theories underlying the charges against him?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. THIS COURT SHOULD APPLY *MATHEWS*, NOT *BARKER*, BECAUSE ASSET RESTRAINTS THAT PREVENT DEFENDANTS FROM RETAINING THEIR COUNSEL OF CHOICE ARE SIGNIFICANT DEPRIVATIONS OF PROPERTY 5

A. The Right to Counsel of Choice Is a Compelling Individual Interest 5

B. *Mathews* Applies to State Deprivations of Property 6

C. The *Bissell* and *Kaley* Courts Erred in Applying *Barker* Instead of *Mathews* 8

II. THE *MATHEWS* TEST REQUIRES AN ADVERSARIAL HEARING IN WHICH THE DEFENDANT CAN CHALLENGE THE UNDERLYING INDICTMENT 11

A. The Risk of Error Is High in Forfeiture Cases, and *Ex Parte* Hearings Will Not Reduce It 5

B. Defendants Have Compelling Individual Interests in Contested Assets that Are Necessary to Pay for Counsel of Choice 14

C. The Government's Interests in Avoiding a Hearing in which Defendants Can Challenge the Underlying Indictment Are Not Compelling..... 15

D. Where the Government Seeks to Restrain Assets that Are Necessary to Pay for Defendants' Counsel of Choice, *Mathews* Requires Such a Hearing..... 16

III. UNDER *MATHEWS*, THE KALEYS ARE ENTITLED TO AN ADVERSARIAL HEARING IN WHICH THEY CAN CHALLENGE THE MERITS OF THE INDICTMENT 19

CONCLUSION..... 21

TABLE OF AUTHORITIES

Page(s)

CASES

Barker v. Wingo,
407 U.S. 514 (1972) ..... *passim*

Bell v. Burson,
402 U.S. 535 (1971) 7

Bennis v. Michigan,
516 U.S. 442 (1999) 13

Caplin & Drysdale v. United States,
491 U.S. 617 (1989) ..... *passim*

Connecticut v. Doehr,
501 U.S. 1 (1991) 6

Costello v. United States,
350 U.S. 359 (1956) 4, 18

Flanagan v. United States,
465 U.S. 259 (1984) 5

Fuentes v. Shevin,
408 U.S. 67 (1972) 7

Goldberg v. Kelly,
397 U.S. 254 (1970) 7

Harmelin v. Michigan,
501 U.S. 957 (1991) 13

Krimstock v. Kelly,
306 F.3d 40 (2d Cir. 2002) 13

Linton v. Perini,
656 F.2d 207 (6th Cir. 1981) 5

Mathews v. Eldridge,
424 U.S. 319 (1976) ..... *passim*

Morrissey v. Brewer,
408 U.S. 471 (1972) 16

Mullane v. Cent. Bank & Hanover Trust Co.,
339 U.S. 306 (1950) 6

Smith v. City of Chicago,
524 F.3d 834 (7th Cir. 2008) 10

Sniadach v. Family Finance Corp.,
395 U.S. 337 (1969) 7

United States v. $8,850,
461 U.S. 555 (1983) 3, 9, 10

United States v. Bissell,
866 F.2d 1343 (11th Cir. 1989) ..... *passim*

United States v. E-Gold, Ltd.,
521 F.3d 411 (D.C. Cir. 2008) 8, 15, 16, 17

United States v. Farmer,
274 F.3d 800 (4th Cir. 2001) 8, 15

United States v. Funds Held ex. rel. Wetterer,
210 F.3d 96 (2d Cir. 2000) 13

United States v. Gonzales-Lopez,
548 U.S. 140 (2006) 1, 5

United States v. Holy Land Found.,
493 F.3d 469 (5th Cir. 2007) (en banc) 8

United States v. James Daniel Good Real Property,
510 U.S. 43 (1993) 8, 11, 12, 13

United States v. Jones
160 F.3d 641 (10th Cir. 1998) 3, 4, 10, 18

United States v. Kaley ("*Kaley I*"),
579 F.3d 1246 (11th Cir. 2009) ..... *passim*

United States v. Kaley ("*Kaley II*"),
677 F.3d 1316 (11th Cir. 2012) 2

United States v. Koblitz,
803 F.2d 1523 (11th Cir. 1986) 5

United States v. Michelle's Lounge,
39 F.3d 684 (7th Cir. 1994) 15

United States v. Monsanto,
924 F.2d 1186 (2d Cir. 1991) (en banc) ..... *passim*

United States v. Monsanto,
924 F.2d 1206 (2d Cir. 1991) (en banc) 8

United States v. Monsanto,
491 U.S. 600 (1989) 17

United States v. Moya-Gomez,
860 F.2d 706 (7th Cir. 1988) 7, 8, 14

United States v. Roth,
912 F.2d 1131 (9th Cir. 1990) 8

United States v. Yusuf,
199 Fed. Appx. 127 (3d Cir. 2006) 8

STATUTES & REGULATIONS

21 U.S.C. § 853 (e) (1) (A) (1988) 17

OTHER AUTHORITIES

Douglas Kim, *Asset Forfeiture: Giving Up Your Constitutional Rights*,
19 Campbell L. Rev. 527 (1997) 12

Kathleen Maguire, ed., *Sourcebook of Criminal Justice Statistics*,University at Albany, Hindelang Criminal Justice Research Center (2009), *available at*
http://www.albany.edu/sourcebook/pdf/t4252010.pdf 11

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. The present case concerns Cato because it involves a threat to the integrity of the adversarial legal system and thus to constitutional due process.

SUMMARY OF ARGUMENT

The right to counsel of choice preserves the integrity of the adversarial process by ensuring that the defendant, not the government, controls whom he trusts with his case. It does not guarantee a fair trial or a good lawyer, but provides "a particular guarantee of fairness—to wit, that the accused be defended by the counsel he believes to be best." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006). Although the Supreme Court held in *Caplin & Drysdale* v. *United States*, 491 U.S. 617 (1989),

---

[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to its preparation or submission.

that the right to counsel of choice does not protect tainted assets, it does represent a compelling individual interest that courts must take seriously.

As a general matter, the Due Process Clause of the Fifth Amendment requires that individuals be given adequate notice and a hearing before any significant deprivation of property. In *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the Court formulated a balancing test to test a given deprivation is consistent with due process. Courts are to consider three factors: (1) the private interest that will be affected; (2) the risk of an erroneous deprivation, and whether additional procedures would reduce the probability of error (3) the government's interest.

While this Court and the overwhelming majority of courts of appeal have used *Mathews* to determine what process is due when the government seeks to restrain contested assets prior to civil or criminal forfeiture, the Eleventh Circuit has long applied a test set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972). In *United States* v. *Bissell*, 866 F.2d 1343 (11th Cir. 1989), the Eleventh Circuit applied the four-factor test that the *Barker* Court used to evaluate speedy trial claims. (This, even though the *Bissell* defendants never claimed that the government delayed their trial. They instead challenged the absence of a hearing between asset restraint and trial.) And in ruling on two interlocutory appeals in the instant case, it reiterated that *Barker*, not *Mathews*, is the appropriate test. *United States* v. *Kaley*, 579 F.3d 1246 (11th Cir. 2009) ("*Kaley I*"); *United States* v. *Kaley*, 677 F.3d 1316 (11th Cir 2012) ("*Kaley II*").

The Eleventh Circuit was wrong to use the *Barker* rather than the *Mathews* test in *Bissell*, and it continues to err here. The *Barker* test inadequately protects the rights of criminal defendants in this context. As this Court noted in *United States* v. *$8,850*, 461 U.S. 555 (1983), *Barker* dealt with the Sixth Amendment, not the Fifth Amendment. *$8,850* used the *Barker* test as "the relevant framework for determining whether the delay in filing a forfeiture action was reasonable" in a *civil asset* forfeiture case, *id.* at 556, whereas *Bissell* concerned criminal forfeiture. There is a stark difference between civil and criminal asset forfeiture. The consequences of losing at a criminal trial are likely to be far more serious because a criminal defendant may be accused of multiple charges, some of which form the predicate for the restraint and forfeiture of assets, while others do not. The *Bissell* court did not take account of this distinction in choosing to apply a standard that is far less demanding than *Mathews*.

Under *Mathews*, where the government seeks to restrain contested assets that would otherwise be used to retain counsel of choice, an adversarial hearing should be required in which defendants can challenge the underlying indictment used to support forfeiture. Because the expansion of forfeiture has given rise to well-documented abuses, the risk of error is great and the individual interests at stake are highly compelling. *Ex parte* hearings are insufficient to reduce the probability of error and the countervailing government interests are insufficient to tip the balance.

Of the lower courts that have applied the *Mathews* test, only those following *United States* v. *Jones*, 160 F.3d 641 (10th Cir. 1998), have held that

the defendants may not challenge the underlying indictment in a pretrial hearing. In *Jones*, the Tenth Circuit held that the Due Process Clause requires nothing more than a hearing to determine if the asset is "traceable to the commission of the offense." *Id.* at 646. It reasoned that allowing defendants to challenge the underlying indictment would violate the Supreme Court's instructions in *Costello* v. *United States*, 350 U.S. 359 (1956).

The *Jones* court misapplied *Mathews*. In *United States* v. *Monsanto*, 924 F.2d 1186 (2d Cir. 1991) (en banc), the Second Circuit correctly distinguished *Costello* as not involving the deprivation of assets needed to retain counsel of choice—and thus the "the additional sixth amendment considerations attendant upon [such deprivations]" were not present. *Id.* at 1196. The Tenth Circuit did not properly consider the gravity of the interests at stake and thus reached the wrong conclusion.

Applying *Mathews* rather than *Barker* to the facts of the present case yields a different result. The restraint of their certificate of deposit not only prevents the Kaleys from retaining some hypothetical counsel of choice, but the very counsel that had represented them since the grand jury investigation began. Indeed, it may prevent them from retaining any attorney at all. Further, the assets at issue are contested, unlike those in *Caplin & Drysdale*. On these facts, *Mathews* requires an adversarial hearing in which the Kaleys can challenge the underlying indictment—not merely the connection between the contested assets and their allegedly illegal activities.

ARGUMENT

I. THIS COURT SHOULD APPLY *MATHEWS*, NOT *BARKER*, BECAUSE ASSET RESTRAINTS THAT PREVENT DEFENDANTS FROM RETAINING THEIR COUNSEL OF CHOICE ARE SIGNIFICANT DEPRIVATIONS OF PROPERTY

A. The Right to Counsel of Choice Is a Compelling Individual Interest

The Sixth Amendment right to counsel of choice preserves the integrity of the adversarial process by ensuring that the defendant, not the government, controls whom the defendant trusts with his case. It is different from the right to effective assistance of counsel because it protects the defendant's choice, rather than providing any substantive guarantee of quality. This Court recognized in *Flanagan* v. *United States*, 465 U.S. 259 (1984), that the right to counsel of choice "reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding." *Id.* at 268. Thus, it does not guarantee a good lawyer, but provides "a particular guarantee of fairness—to wit, that the accused be defended by the counsel he believes to be best." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 146 (2006). As the Eleventh Circuit explained in *United States* v. *Koblitz*, "were a defendant not provided the opportunity to select his own counsel at his own expense, substantial risk would arise that the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut." 803 F.2d 1523, 1528 (11th Cir. 1986) (quoting *Linton* v. *Perini*, 656 F.2d 207, 209 (6th Cir. 1981)).

The right to counsel of choice is not absolute. In *Caplin & Drysdale* v. *United States*, 491 U.S. 617 (1989), this Court upheld an asset forfeiture over the defendant's objection that he needed the assets to retain counsel. The defendant had already pled guilty to bank robbery, so the "strong governmental interest in obtaining full recovery of all forfeitable assets" trumped "any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense." *Id.* at 631. It reasoned that "[t]here is no constitutional principle that gives one person the right to give another's property to a third party." *Id.* at 628.

In sum, even though it cannot protect tainted property from forfeiture, the right to counsel of choice is a compelling individual interest because it is critical to the integrity of the adversarial process.

B. *Mathews* Applies to State Deprivations of Property

As a general matter, the Fifth Amendment's Due Process Clause requires that individuals be given notice and a hearing before they may be deprived of life, liberty, or property. *See, e.g.*, *Mullane* v. *Cent. Bank & Hanover Trust Co.*, 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."); *Connecticut* v. *Doehr*, 501 U.S. 1, 18 (1991) (requiring prior notice and a hearing in the absence of "exigent circumstance[s]"). In *Fuentes* v. *Shevin*, this Court held that "[a]ny significant taking of property by the

state is within the purview of the Due Process Clause." 407 U.S. 67, 86 (1972). A temporary, non-final deprivation of property is still a deprivation. *See generally Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Bell* v. *Burson*, 402 U.S. 535 (1971).

What process is due depends on the context. Any procedures must be tailored to "the capacities and circumstances of those who are to be heard," *Goldberg* v. *Kelly*, 397 U.S 254, 268-69 (1970), to ensure that they are given a meaningful opportunity to present their case. In *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the Court created a test for determining whether a deprivation is consistent with due process. Courts are to consider three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Because asset restraint temporarily prevents individuals from using or possessing property, it constitutes a significant deprivation. *See United States* v. *Moya-Gomez*, 860 F.2d 706, 725-26 (7th Cir. 1988) ("While the restraining order does not divest definitively the ownership rights of the defendant, it certainly does remove those assets from his immediate control and therefore divest him of a

significant property interest."). Accordingly, this Court, together with the overwhelming majority of lower courts, has used *Mathews* to determine what process is due when the government seeks to restrain contested assets prior to civil or criminal forfeiture. *Mathews* "is the traditional test employed in order to determine what process is due before a deprivation of property at the hands of the state may be sustained." *Kaley I*, 579 F.3d at 1260. In *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993), the Supreme Court applied *Mathews* to a restraint of real property. The Second, Third, Fourth, Fifth Seventh, Ninth, Tenth Circuits, and D.C. Circuits have also applied *Mathews* to asset restraint. *See, e.g.*, *United States* v. *Monsanto*, 924 F.2d 1206 (2d Cir. 1991) (en banc); *United States* v. *Yusuf*, 199 Fed. Appx. 127(3d Cir. 2006); *United States* v. *Farmer*, 274 F.3d 800 (4th Cir. 2001); *United States* v. *Holy Land Found.*, 493 F.3d 469 (5th Cir. 2007) (en banc); *United States* v. *Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988); *United States* v. *Roth*, 912 F.2d 1131 (9th Cir. 1990); *United States* v. *Jones*, 160 F.3d 641, 648 (10th Cir. 1998); *United States* v. *E- Gold, Ltd.*, 521 F.3d 411 (D.C. Cir. 2008).

C. The *Bissell* and *Kaley* Courts Erred in Applying *Barker* Instead of *Mathews*

In the face of this near-universal agreement that *Mathews* is the proper test for asset restraint, the Eleventh Circuit has long applied a test set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972). *Barker* concerned a criminal defendant who claimed that his Sixth Amendment right to a speedy trial had been violated. In *Bissell*, the Eleventh Circuit applied *Barker*'s four-factor test and considered (1) the length of the delay before the defendants received

their post-restraint hearing; (2) the reason for the delay; (3) the defendants' assertion of the right to such a hearing pretrial; and (4) the prejudice the defendants suffered due to the delay weighed against the strength of the United States' interest in the subject property. 866 F.2d at 1352 (citing *Barker*, 504 U.S. at 530). The *Kaley I* court, considering itself bound by precedent, also reluctantly applied *Barker*.[2]

As this Court noted in *$8,850*, *Barker* dealt with the Sixth Amendment, not the Fifth. *United States* v. *$8,850*, 461 U.S. 555, 564 (1983) ("*Barker* dealt with the Sixth Amendment right to a speedy trial, rather than the Fifth Amendment right against deprivation of property without due process of law.") Indeed, the *Barker* Court explicitly sought to "set out the criteria by which the speedy trial right is to be judged." *Barker*, 407 U.S. at 516. This Court applied *Barker* in *$8,850* because the Fifth Amendment claim at issue "challenge[d] only the length of time between the seizure and the initiation of the forfeiture trial" and thus "mirror[ed] the concern of undue delay encompassed in the right to a speedy trial." *$8,850*, 461 U.S. at 564.

But the *Bissell* defendants did not claim that the government delayed their trial (but rather complained of the absence of a hearing between asset restraint and trial). And where no delay has been alleged, *Barker* is inapplicable. Subsequent to *Bissell*, the Seventh and Tenth Circuits thus rightly distinguished between two types of challenges to the

---

[2] The *Kaley I* court noted in dicta, however, that "[i]f we were writing on a blank slate today we would be inclined . . . to apply the test announced by the Supreme Court in *Mathews*." *Kaley I*, 579 F.3d at 1259.

asset-forfeiture process: 1) whether and how forfeitability can be challenged; 2) issues relating to the speed of forfeiture proceedings. *Mathews* applies to cases that do not involve delay. *See, e.g.*, *Smith* v. *City of Chicago*, 524 F.3d 834, 837 (7th Cir. 2008) ("*8,850* concerns the speed with which the civil forfeiture proceeding itself is begun—a different question from whether there should be some mechanism to promptly test the validity of the seizure"); *Jones*, 160 F.3d at 645 n.3 ("Defendants here complain that the statutory scheme deprives them of a property interest without due process, not that dilatory conduct on the part of the government has deprived them of the right to a hearing at a meaningful time.").

Further, *$8,850* concerned civil forfeiture, while *Bissell* concerned criminal forfeiture. The consequences of a criminal trial can be far more serious than a civil trial, threatening the loss of liberty and even life in addition to property. A criminal defendant may be accused of multiple charges—some of which form the predicate for the restraint and forfeiture of assets, while others do not. The *Bissell* court did not take into account this distinction in choosing to apply a standard that is far less demanding.

The Eleventh Circuit repeated its *Bissell* error here. Like the defendants in *Bissell*, the Kaleys did not argue that forfeiture proceedings had been delayed for too long, but that there should be a mechanism in place to test the validity of the seizure. Given that there was no timing issue, the court should have applied *Mathews* to decide whether to order a pretrial hearing in which the Kaleys could challenge the facts foundation of their indictment.

II. THE *MATHEWS* TEST REQUIRES AN ADVERSARIAL HEARING IN WHICH THE DEFENDANT CAN CHALLENGE THE UNDERLYING INDICTMENT

Having explained why the *Kaley* court erred in applying *Barker* rather than the *Mathews*, this brief now considers what process is due under *Mathews*.

A. The Risk of Error Is High in Forfeiture Cases, and *Ex Parte* Hearings Will Not Reduce It

The first prong of *Mathews* focuses on the probability of an erroneous deprivation of life, liberty, or property, and the probable value, if any, of additional procedures. Forfeiture use has greatly expanded over the past few decades.[3] With such expansion comes opportunity for abuse. In the first place, government actors can use forfeiture simply to raise revenue for law enforcement, rather than interrupt the flow of illicit commerce, compensate victims, or punish the guilty.[4]

---

[3] In the 22 years from 1989 to 2010, an estimated $12.6 billion in assets was seized by U.S. Attorneys in asset forfeiture cases. Maguire, Kathleen, ed., "Sourcebook of Criminal Justice Statistics," U.S. Department of Justice, Bureau of Justice Statistics (Albany, NY: University of Albany, School of Criminal Justice, Hindelang Criminal Justice Research Center, 2009) Table 4.45.2010, http://www. albany.edu/sourcebook/pdf/t4452010.pdf.

[4] By statute, the DOJ uses forfeited assets to fund its own operations. In 1990, the Attorney General distributed a memorandum to all U.S. Attorneys encouraging them "to significantly increase production"—that is, "the volume of forfeitures in order to meet the Department of Justice's annual budget target." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 n.2 (1993)(citing Exec. Office for U.S. Attorneys, U.S. Dept. of Justice, 38 U.S. Attorney's Bulletin 180 (1990)).

Second, prosecutors can use forfeiture to strategically disarm the defense. David B. Smith, co-chair of the forfeiture abuse task force of the National Association of Criminal Defense Lawyers and former deputy chief of asset forfeiture at the U.S. Department of Justice, describes the results of forfeiture expansion thus:

> Abuses are common both in civil and criminal cases. Police and prosecutors become bounty hunters. The assets of suspects, including the innocent, become the bounty. Law enforcement agents not only lust after the assets of the accused, they have come to depend on the revenues they get through forfeiture.

Quoted in Douglas Kim, *Asset Forfeiture: Giving Up Your Constitutional Rights*, 19 Campbell L. Rev. 527, 528 n.9 (1997).

This Court has grown increasingly concerned about these government abuses and urged tighter scrutiny of forfeiture practice. Justice Blackmun sounded the alarm early in his *Caplin & Drysdale* dissent, asserting that "forfeiture statutes place the Government in the position to exercise an intolerable degree of power over any private attorney who takes on the task of representing a defendant in a forfeiture case." 491 U.S. at 650 (Blackmun, J., dissenting). He reasoned that the "Government will be ever tempted to use the forfeiture weapon against a defense attorney who is particularly talented or aggressive on the client's behalf—the attorney who is better than what, in the Government's view, the defendant deserves." *Id.* In *James Daniel Good Real Property*, the Court acknowledged the government's

"direct pecuniary interest in the outcome of (forfeiture) proceeding(s)," and asserted that courts should "scrutinize action more closely when the State stands to benefit." 510 U.S. at 56 (quoting *Harmelin* v. *Michigan*, 501 U.S. 957, 979, n.9 (1991) (Scalia, J.)). Justice Thomas in particular has urged that forfeiture be given a hard look because of the potential for abuse. In his *James Daniel Good* concurrence, he stated that, in light of "ambitious modern [forfeiture] statutes and prosecutorial practices . . . [i]t may be necessary . . . to reevaluate our generally deferential approach to legislative judgments in this area." *Id.* at 81 (Thomas, J., concurring in part, dissenting in part). Similarly, in *Bennis* v. *Michigan*, he warned that if it were "improperly used, forfeiture could become more like a roulette wheel employed to raise revenue." 516 U.S. 442, 456 (1999) (Thomas, J., concurring).

Courts of appeals have heeded these warnings. In *United States* v. *Funds Held ex rel. Wetterer*, the Second Circuit noted the "potential for abuse" and "corrupting incentives" of a system where the Department of Justice "conceives the jurisdiction and ground for seizures, and executes them, [and] also absorbs their proceeds." 210 F.3d 96, 110 (2d Cir. 2000). *See also Krimstock* v. *Kelly*, 306 F.3d 40, 63 (2d Cir. 2002) (considering the City's "pecuniary interest in the outcome [of a forfeiture]" in the course of its "inquiry into the risk of error"). The *Bissell* court expressed concern that "prosecutors will seek broad, sweeping restraints recklessly or intentionally encompassing legitimate, nonindictable assets" in order to disarm the defense. *Bissell*, 866 F.2d at 1354-55. In his *Kaley I* concurrence, Judge Tjoflat explained that a prosecutor "has everything to gain

by restraining assets that ultimately may not be forfeited. . . . [H]e can stack the deck in the government's favor by crippling the defendant's ability to afford high-quality counsel." *Kaley I*, 579 F.3d at 1267 (Tjoflat, J., concurring).

Because the expansion of asset forfeiture has created perverse incentives for law enforcement officers and prosecutors and because *ex parte* hearings do not sufficiently protect defendants, there is a high probability of error in asset restraint and it is unlikely that additional procedures will reduce it.

B. Defendants Have Compelling Individual Interests in Contested Assets that Are Necessary to Pay for Counsel of Choice

Because the state has no effective cap on the resources it can expend, the adversarial process by its very nature favors the prosecution. Asset restraint can enable prosecutors, on the strength of a probable cause showing, to prevent defendants from compensating attorneys, investigators, paralegals, and consultants. It can also prevent them from paying expenses arising from trial preparation or the development of trial strategy. This dynamic exacerbates the resource disparity between prosecution and defense and compromises the integrity of the adversary process. As the Seventh Circuit explained, "[i]f one party can skew the process to its advantage, the integrity of the entire process is harmed." *Moya-Gomez*, 860 F.2d at 729.

Accordingly, in cases where asset restraint would prevent defendants from obtaining the counsel of their choice, numerous courts of appeals have required adversarial hearings. In *United States* v. *Michelle's Lounge*, the Seventh Circuit held that a

hearing is required where "the government has seized through civil forfeiture all of the assets a criminal defendant needs to obtain counsel." 39 F.3d 684, 700 (7th Cir. 1994). The D.C. Circuit reached the same conclusion in *United States* v. *E-Gold*, concluding that due process demands that defendants be given a hearing "at least where access to the assets is necessary for an effective exercise of the Sixth Amendment right to counsel." 521 F.3d 411, 421 (D.C. Cir. 2008).

Crucially, the assets in *Michelle's Lounge* and *E-Gold* were contested. In *United States* v. *Farmer*, the Fourth Circuit clarified that its holding only applied where "a defendant claims that a portion of the assets restrained . . . are untainted." 274 F.3d 800, 803 (4th Cir. 2001). That court interpreted *Caplin & Drysdale* to stand for the proposition that "there is no Sixth Amendment right for a defendant to obtain counsel using tainted funds." *Id.* at 804.

Where the government seeks to restrain contested assets that are necessary to retain counsel of choice, compelling individual interests that go to the integrity of the adversary process are implicated.

C. The Government's Interests in Avoiding a Hearing in which Defendants Can Challenge the Underlying Indictment Are Not Compelling

Under *Mathews*, courts must balance the government's interests in avoiding additional process against the individual's interests in receiving it. In its brief, the government focuses on two interests: (1) preventing "premature disclosure of the government's case and trial strategy" and (2) protecting "[the] safety of testifying witnesses,

including victims and cooperators." Gov't Brief at 17.

But. of course, the government can avoid tipping its hand to the defense by not seeking pretrial restraint in the first place. *See, e.g., Monsanto*, 924 F.2d at 1198 (pointing out that the government "always has the option of forgoing the restraint and obtaining forfeiture after conviction").

Concerns about safety can also be addressed procedurally. In *E-Gold*, the D.C. Circuit explained that "[i]t is not necessarily the case that affording indicted defendants a right to be heard before the deprivation of their property rights and liberty interests under the Fifth and Sixth Amendments entails an invasion of grand jury secrecy or an evisceration of the important goals of that secrecy." 521 F.3d at 419. It suggested that *in camera* hearings and appropriate application of the normal rules of evidence could protect the grand jury proceedings against unwarranted invasion, thus, the safety of the participants. *Id.*

The government's interest in avoiding additional judicial process are simply not compelling.

D. Where the Government Seeks to Restrain Assets that Are Necessary to Pay for Defendants' Counsel of Choice, *Mathews* Requires Such a Hearing

This Court has consistently held that the features of the "notice and hearing" required before any given deprivation of liberty or property must be determined contextually. In *Morrissey* v. *Brewer*, for example, it stated that "due process is flexible and calls for such procedural protections as the particular situation demands." 408 U.S. 471, 481 (1972).

Except for the aberrant Tenth and Eleventh Circuits, lower courts have understood the uniquely sensitive circumstances that arise when there is a pretrial restraint of assets that are needed by the defendant to retain counsel of choice. In *United States* v. *Monsanto*, this Court did "not consider . . . whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed." 491 U.S. 600, 615 n.10 (1989). On remand, the Second Circuit ruled that the Fifth and Sixth Amendments, "considered in combination," require an "adversary, post-restraint, pretrial hearing as to probable cause that (a) the defendant committed crimes that provide a basis for forfeiture, and (b) the properties specified as forfeitable in the indictment are properly forfeitable, to continue a restraint of assets" that are needed to both "retain counsel of choice" and "ordered *ex parte* pursuant to 21 U.S.C. § 853(e)(1)(A) (1988)." *Monsanto*, 924 F.2d at 1203. It specified that the court could "receive and consider at such a hearing evidence and information that would be inadmissible under the Federal Rules of Evidence." *Id.* Most importantly, it asserted that "grand jury determinations of probable cause may be reconsidered in such a hearing"—that is, defendants can challenge the underlying criminal indictment on the merits, not merely the connection between the restrained assets and their alleged criminal activity. *Id.* In *E-Gold*, the D.C. Circuit followed *Monsanto*, holding that due process in such cases required a hearing "at which defendant can challenge 'the existence of probable cause as to both the [predicate criminal offense] and the forfeitability of the specified property.'" 521 F.3d at 418 (quoting *Monsanto*, 924 F.2d at 1197).

Of the lower courts that have applied the *Mathews* test to similar fact patterns, only those following the Tenth Circuit have prevented the defendant from challenging the underlying indictment. In *Jones*, the Tenth Circuit held that the Due Process Clause requires only a hearing to determine if the asset to be restrained is "traceable to the commission of the offense." 160 F.3d at 646. It reasoned that allowing defendants to challenge the underlying indictment would violate the Supreme Court's instructions in *Costello* v. *United States*, 350 U.S. 359 (1956). It cited *Costello* for the proposition that "[d]efendants are not entitled . . . to a rule which would result in interminable delay but add nothing to the assurance of a fair trial." *Id.* at 364.

Yet the *Jones* court misapplied *Mathews*, just as the Eleventh Circuit did here. The *Monsanto* court correctly distinguished *Costello* on the grounds that it did not involve the deprivation of assets needed to retain counsel of choice and, thus, the "the additional sixth amendment considerations attendant upon [such deprivations]" were not present. *Monsanto*, 924 F.2d at 1196. Remembering that due process analysis is situational, the fact that the *Costello* Court declined to allow a challenge to the underlying indictment should not have been dispositive.

III. UNDER *MATHEWS*, THE KALEYS ARE ENTITLED TO AN ADVERSARIAL HEARING IN WHICH THEY CAN CHALLENGE THE MERITS OF THE INDICTMENT

We have seen that, where the government seeks to restrain contested assets that are necessary for defendants to retain the counsel of their choice, *Mathews* requires an adversarial hearing in which the merits of the underlying indictment used to support the restraint may be challenged.

The restraint at issue prevents the Kaleys from retaining the attorneys of their choice. The Kaleys were informed that it would cost them approximately $500,000 to take the case through trial, and they applied for and obtained a home equity line of credit in that amount on their residence. They used the proceeds to buy a certificate of deposit (CD). The indictment against the Kaleys sought criminal forfeiture of all property traceable to their allegedly illegal activities, including the CD. Absent the CD, the Kaleys could not continue to retain the attorneys that had represented them for two years.

Unlike the assets in *Caplin & Drysdale*, the funds in the Kaleys' CD are contested. They were restrained after a probable cause hearing focused solely on whether the assets were traceable to their allegedly illegal activities. The Kaleys do not deny that the funds in the CD are connected to the activities for which they have been indicted, but they do deny that those activities were illegal.

These two features of the case alone are sufficient under *Mathews* to require a hearing in which the underlying indictment can be challenged. Simply

identifying them does not capture the full weight of the burden that the restraint places on the Kaleys, however, which the *Kaley I* court described as "serious and substantial." *Kaley I*, 579 F.3d at 1259.

For the Kaleys, being deprived of their counsel of choice is particularly burdensome because of counsel's longstanding involvement in their case—since the grand jury investigation began. The *Kaley I* court emphasized that restraining the CD would, for the Kaleys, entail "losing access to long-time counsel who have already invested substantial time into learning the intricacies of the Kaleys' case and preparing for trial." *Id.* at 1258.

Indeed, this restraint may prevent the Kaleys from hiring any attorney at all. The *Kaley I* court found that in order to retain any private counsel, the Kaleys would have to incur a $183,500 non-recoverable liquidation and tax penalty in order to release their only remaining unrestrained assets (retirement and college savings accounts). Accessing the $323,000 contained in their 401(k) plan at the time the district court considered their motion would cost them a $168,000 penalty for early withdrawal as well as income taxes, leaving them with only $155,000 for legal fees. Finally, to access the $111,000 contained in college savings accounts, the Kaleys would have to pay $15,000 in liquidation penalties and capital gains taxes that they could never recover.

Applying *Mathews* here rather than *Barker* yields a different result: An adversarial hearing in which the Kaleys could challenge the underlying indictment, not merely the connection between the contested assets and their allegedly illegal activities.

Indeed, the Eleventh Circuit acknowledged that if it were to apply *Mathews*, the Kaleys "would be entitled to a pretrial hearing on the merits of the protective order." *Kaley I*, 579 F. 3d at 1260.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and remand the case, with instructions to grant the Kaleys a pretrial hearing at which they can show that the government did not have probable cause to restrain their assets.

Respectfully submitted,

ILYA SHAPIRO
Cato Institute
1000 Mass. Ave., NW
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

JULY 1, 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-464

In the Supreme Court of the United States

KERRI L. KALEY AND BRIAN P. KALEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Michael Ufferman
FLORIDA ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS
2022-1 Raymond Diehl Road
Tallahassee, FL 32308

Karen M. Gottlieb
Florida Capital Resource Center
100 N. Biscayne Boulevard
Suite 3070
Miami, FL 33132

Sonya Rudenstine
Attorney at Law
204 W. University Ave., Suite 5
Gainesville, FL 32601

Courtney J. Linn
Counsel of Record
Robert M. Loeb
Mark Mermelstein
Mona Amer
David W. A. Spencer
ORRICK, HERRINGTON &
SUTCLIFFE LLP
400 Capitol Mall
Suite 3000
Sacramento, CA 95819
(916) 447-9200
clinn@orrick.com

Counsel for *Amicus Curiae*

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 6

I. SECTION 853(E)(1)(A) SHOULD BE READ TO AFFORD A MEANINGFUL POST-DEPRIVATION HEARING 6

II. DUE PROCESS REQUIRES A MEANINGFUL AND TIMELY ADVERSARY POST-DEPRIVATION HEARING AT WHICH THE PARTY BEING DEPRIVED OF PROPERTY MAY CHALLENGE ALL ASPECTS OF THE *EX PARTE* SEIZURE ORDER 11

A. The *Mathews v. Eldridge* Test Provides The Appropriate Due Process Analysis In This Context 11

B. The Private Interest Is Weighty, Encompassing Not Only Defendants' Interest In The Restrained Assets, But Also Their Liberty Interests In Counsel Of Choice And Avoiding Incarceration 13

C. The Risk Of Erroneous Deprivation Weighs Heavily In Favor Of A Meaningful And Timely Post-Deprivation Hearing 18

1. The Grand Jury Procedure Is Not An Effective Safeguard Against Erroneous Pretrial Restraints 18

2. Rubber Stamp Grand Juries Are Improperly Being Used In Attempt To Insulate Seizure Orders From Review 20

3. The Government's Growing Dependency On And Direct Pecuniary Interest In Forfeiture Strongly Support The Need For Meaningful Post-Deprivation Review 21

4. The Opportunity To Contest Probable Cause As To The Underlying Charges Is Imperative Given The Government's Incentive To Maximize The Assets It Can Restrain By Over-Charging Criminal Cases 28

5. The Complexity Of The Factual And Legal Issues Militates In Favor Of An Adversary Hearing 31

6. A Pretrial Adversary Hearing Would Reduce Erroneous Deprivations Of Choice Of Counsel By Minimizing Uncertainty About The Legitimacy Of The Defendant's Assets 33

D. The Government's Interests Are Outweighed By The Other Mathews Factors And Can Be Adequately Protected In The Few Cases In Which They Are Significantly Threatened 35

CONCLUSION 38

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Armstrong v. Manzo,
380 U.S. 545 (1965) 7

Ashwander v. TVA,
297 U.S. 288 (1936) 6

In re Assets of Martin,
1 F.3d 1351 (3d Cir. 1993) 28, 31

Baldwin v. Hale,
68 Wall. 223 (1863) 7

Barker v. Wingo,
407 U.S. 514 (1972) 3, 11

Caplin & Drysdale, Chartered v. United States,
491 U.S. 617 (1989) 15, 16

City of Los Angeles v. David,
538 U.S. 715 (2003) 12

Connecticut v. Doehr,
501 U.S. 1 (1991) 14

Crowell v. Benson,
285 U.S. 22 (1932) 6

Franks v. Delaware,
438 U.S. 154 (1978) 19

Fuentes v. Shevin,
407 U.S. 67 (1972) 7, 13, 18

Gilbert v. Homar,
520 U.S. 924 (1997) 8

Goldberg v. Kelly,
397 U.S. 254 (1970) 14

Joint Anti-Fascist Refugee Comm. v. McGrath,
341 U.S. 123 (1951) 18

Lassiter v. Dep't of Soc. Servs. of Durham Cnty.,
452 U.S. 18 (1981) 14

Mathews v. Eldridge,
424 U.S. 319 (1976) ..... *passim*

Melendez-Diaz v. Massachusetts,
557 U.S. 305 (2009) 17

Mitchell v. W. T. Grant Co.,
416 U.S. 600 (1974) 31

One 1958 Plymouth Sedan v. Pennsylvania,
380 U.S. 693 (1965) 19

Pearson v. Callahan,
129 S. Ct. 808 (2009) 6

In re Rothstein, Rosenfeldt, Adler, P.A.,
No. 11-10676, 2013 WL 2494980 (11th Cir. June 12, 2013) 32

Rust v. Sullivan,
500 U.S. 173 (1991) 10

Scott v. Harris,
550 U.S. 372 (2007) 6

Spector Motor Serv., Inc. v. McLaughlin,
323 U.S. 101 (1944) 6

Turner v. Rogers,
131 S. Ct. 2507 (2011) 12

United States v. Bailey,
419 F.3d 1208 (11th Cir. 2005) 33

United States v. Bajakajian,
524 U.S. 321 (1998) 32

United States v. Bollin,
264 F.3d 391 (4th Cir. 2001) 29

United States v. Contorinis,
692 F.3d 136 (2d Cir. 2012) 1

United States v. Davila,
No. 12-167, slip op. (U.S. June 13, 2013) 15

United States v. DBB, Inc.,
180 F.3d 1277 (11th Cir. 1999) 36

United States v. Dionisio,
410 U.S. 1 (1973) 21

United States v. E-Gold, Ltd.,
521 F.3d 411 (D.C. Cir. 2008) 13, 37

United States v. Eight Thousand Eight Hundred and Fifty Dollars,
461 U.S. 555 (1983) 11

United States v. Field,
62 F.3d 246 (8th Cir. 1995).....29

United States v. Floyd,
992 F.2d 498 (5th Cir. 1993).....29

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006).....3, 15

United States v. Gotti,
155 F.3d 144 (2d Cir. 1998).....28

United States v. Holy Land Found. for Relief & Dev.,
493 F.3d 469 (5th Cir. 2007).....13

United States v. Huber,
404 F.3d 1047 (8th Cir. 2005).....29

United States v. James Daniel Good Real Property,
510 U.S. 43 (1993).....*passim*

United States v. Jin Fuey Moy,
241 U.S. 394 (1916).....6

United States v. Kaley,
No. 07-80021-CR-MARRA/Seltser. Dkt. No. 70-1
(Apr. 27, 2007).....28

United States v. Kaley,
579 F.3d 1246 (11th Cir. 2009).....19, 30

United States v. Kaley,
677 F.3d 1316 (11th Cir. 2012).....18

United States v. Mahaffy,
693 F.3d 113 (2d Cir. 2012).....31

United States v. McCorkle,
321 F.3d 1292 (11th Cir. 2003).....33

United States v. McGauley,
279 F.3d 62 (1st Cir. 2002).....29

United States v. Moffitt, Zwerling & Kemler,
83 F.3d 660 (4th Cir. 1996).....33

United States v. Monsanto,
924 F.2d 1186 (2d Cir. 1991).....*passim*

United States v. Parrett,
530 F.3d 422 (6th Cir. 2008).....29

United States v. Property at 4492 S. Livonia Rd., Livonia,
889 F.2d 1258 (2d Cir. 1989).....7

United States v. Ripinsky,
20 F.3d 359 (9th Cir. 1994).....29

United States v. Saccocia,
354 F.3d 9 (1st Cir. 2003).....33

United States v. Swiss Am. Bank,
191 F.3d 30 (1st Cir. 1999).....33

United States v. Tencer,
107 F.3d 1120 (5th Cir. 1997).....32

United States v. Velez,
586 F.3d 875 (11th Cir. 2009).....33

United States v. Von Neumann,
474 U.S. 242 (1986).....11

United States v. Williams,
504 U.S. 36 (1992) 19

Walters v. Nat'l Assoc. of Radiation Survivors,
473 U.S. 305 (1985) 14

Zadvydas v. Davis,
533 U.S. 678 (2001) 6, 7

State Cases

Public Defender v. Florida,
Nos. SC09-1181, SC10-1349, 2013 WL 2248965
(Fla. May 23, 2013) 16

Federal Statutes

12 U.S.C. § 1818(i)(4) 36

18 U.S.C. § 981(a)(1)(A) 29

18 U.S.C. § 981(a)(1)(C) 29

18 U.S.C. § 982(a)(1) 29

18 U.S.C. § 982(a)(2) 29

18 U.S.C. § 983(c)(3) 32

18 U.S.C. § 1345(a)(2) 35

21 U.S.C. § 853 ..... 9, 13, 21, 35

21 U.S.C. § 853(e) 2, 8, 9, 15

21 U.S.C. § 853(e)(1)(A) 1, 6, 19, 20

21 U.S.C. § 853(e)(3) 2, 5, 9, 37

28 U.S.C. § 524(c) 28

31 U.S.C. § 9703 28

Rules

Fed. R. Civ. P. 65 36

11th Circuit Rule 46-10(a) 34

S.D. Fla Local Rule 88.7 34

Constitutional Provisions

Fourth Amendment 19

Fifth Amendment 1, 7, 11

Sixth Amendment ..... *passim*

Other Authorities

Assets Forfeiture Fund, Total Expenses Paid from Fund by Category of Expense and Recipient Agency: Expenses of Federal Agencies FY 2012 27

Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (2008) 16

Executive Office for United States Attorneys, U.S. Dept. of Justice, *38 United States Attorney's Bulletin 180* (1990) 21

H. Rep. No. 98-845 (1984) 10

John B. Gould, et al., Predicting Erroneous Convictions: A Social Science Approach to Miscarriages of Justice 81-82(2012) (report to the U.S. DOJ) 16

Justice Assets Forfeiture Fund, Transparency of Balances and Controls over Equitable Sharing Should Be Improved, at 11 (July 2012) 25

Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense 14-19* (ABA 2011) 16

Note, *Effectively Ineffective: The Failure of Courts To Address Underfunded Indigent Defense Systems*, 118 Harv. L. Rev. 1731 (2005) 16

Rachel Burg, Note, *Un-Convicting the Innocent: The Case for Shaken Baby Syndrome Review Panels*, 45 U. Mich. J. L. Reform 657 (2012) 17

S. Rep. No. 98-225 (1983) 9

Stefan D. Cassella, *Asset Forfeiture Law In the United States*, § 2.1 (2d ed. 2013) 22, 32

Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. Crim. L. & Criminology 1171 (2008) 20

U.S. Dep't of Justice, *Asset Forfeiture Policy Manual* (2012) 20, 25

U.S. Dep't of Justice, Audit Report 08-14, *Assets Forfeiture Fund Annual Financial Statements Fiscal Year 2007* (2008) 24

U.S. Dep't of Justice, Audit Report 13-07, Assets *Forefeiture Fund Annual Financial Statements Fiscal Year 2012* (2013) 23

U.S. Dep't of Justice, *National Asset Forfeiture Strategic Plan* 2008-2012 .....25, 26

U.S Dep't of Treasury, *Treasury Forfeiture Fund Accountability Report, Fiscal Year 2012*.....27

United States Government Accountability Office, GA)-12-736, *Justice Assets Forfeiture Fund, Transparency of Balances and Controls over Equitable Sharing Should Be Improved* (July 2012).....25

United States Government Accountability Office, GAO-12-972, *Asset Forfeiture Programs: Justice and Treasury Should Determine Costs an ! Benefits of Potential Consolidation* (September 2012).....23

INTEREST OF *AMICUS CURIAE*[1]

The Florida Association of Criminal Defense Lawyers ("FACDL"), an independent affiliate of the National Association of Criminal Defense Lawyers, is a nonprofit corporation with a membership of over 1,500 attorneys and 28 chapters throughout the state of Florida. FACDL's members are all practicing criminal defense attorneys committed to preserving fairness within Florida's criminal justice system and ensuring due process for the accused.

SUMMARY OF ARGUMENT

I. The Due Process Clause of the Fifth Amendment generally requires notice and an opportunity to be heard *prior* to the deprivation of a property interest. Only in extraordinary situations may notice and a hearing be postponed until after the deprivation. Even then, constitutional due process requires a prompt and meaningful post-deprivation hearing.

In the present case, petitioners' property was seized without their having any opportunity to present evidence or to be heard. When petitioners were indicted, the government sought and obtained an *ex parte* order, under the authority of 21 U.S.C. § 853(e)(1)(A), restraining all "the property listed for

---

[1] The parties have consented to the filing of this brief, and their written consents are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and its counsel has made any monetary contribution to the preparation or submission of this brief.

forfeiture in the indictment," valued at more than $2.6 million. J.A. 44-47.

The question presented here is whether a defendant subject to such an *ex parte* seizure order has a right to a post-deprivation hearing providing a meaningful opportunity to contest the seizure of his property. Because the denial of such a fundamental post-deprivation hearing in this context raises serious constitutional issues, Section 853(e) is properly read to afford such a hearing. The statute expressly speaks to a "hearing held pursuant to this subsection," where the court would receive and consider "evidence and information," even such evidence "that would be inadmissible under the Federal Rules of Evidence." 21 U.S.C. § 853(e)(3). The nature of such hearings and the full scope of when they are required are undefined. In order to avoid serious constitutional concerns, the statute is properly read to mandate a meaningful post-deprivation hearing, challenging all aspects of the *ex parte* order.

II. Thus, this Court need not reach the constitutional issue presented here. If, however, the Court does reach the due process issue, it should hold that due process mandates an opportunity to challenge all aspects of the *ex parte* order. As this Court held in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), the Due Process Clause requires the government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture. Post-deprivation hearing rights must be at least as rigorous.

In addressing the due process issue, the panels of the Eleventh Circuit that decided *Kaley I* and *Kaley II* looked to the four-part test this Court set out in *Barker v. Wingo*, 407 U.S. 514 (1972). *Barker* addressed Sixth Amendment speedy trial concerns, and does not provide a suitable framework to evaluate and weigh the competing considerations in this context. Rather, the better vehicle for analyzing the due process issue here is the three-factor test established by *Mathews v. Eldridge*, 424 U.S. 319 (1976). Under that test, petitioners are entitled to a prompt post-deprivation adversary hearing at which they may challenge all facets of the *ex parte* restraining order.

The first *Mathews* factor analyzes the private interests at stake. Here, Brian and Kerri Kaley are being deprived of their ability to use their own money. Importantly, this deprivation impairs their ability to secure a lawyer of their choosing and defend themselves against serious federal criminal charges. Those interests are weightier than the interests implicated in *James Daniel Good*, where there was no claim that the deprivation of the use of the property impaired the Sixth Amendment right to secure qualified counsel of choice. *See, e.g., United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (ranking "deprivation of the right to counsel of choice" as "structural error").

The risk of erroneous deprivation—the second *Mathews* factor—similarly supports petitioners here. Fairness can rarely be achieved by a secret, one-sided determination of facts decisive of rights. Both of the procedures the government used here were *ex parte*. One involved the presentation of evidence to the

grand jury in a secret proceeding. A second involved the *ex parte* presentation of an affidavit of a law enforcement agent. These one-sided pro-government proceedings give no reason for confidence in their correctness. Without the crucible of an adversary proceeding—where the person being deprived of property has a chance to present evidence and challenge the validity of the evidence relied upon by the government—the danger of erroneous deprivation is plain.

The risk of error is enhanced in this context where the government has a direct pecuniary interest in the outcome of those *ex parte* proceedings. The government is addicted to forfeiture funds. In order to feed that addiction, the government, as here, pushes the envelope on its theories of prosecution with the aim of reaching all of the defendants' assets (and by doing so crippling their ability to pay counsel for their defense). In 1990, a Justice Department memo established a goal of raking in $470 million in asset forfeitures that year. That large figure, which raised eyebrows in *James Daniel Good*, is dwarfed by the level of dependence on forfeiture funds today. The Justice Department's Asset Forfeiture Fund received *$4.2 billion* in net forfeiture deposits in fiscal year 2012. That financial dependency renders reliance on the findings of a completely *ex parte* proceeding, seeking more funds to fuel the government's addiction, unreliable.

The third *Mathews* factor addresses the governmental interest, including the burdens that additional process would impose. The government's only burden would be having to participate in a post-dep-

rivation hearing where the party subject to the seizure is allowed to present evidence and to contest the findings of the prior *ex parte* determinations that supported the seizure. But in other contexts where the government restrains and seizes property based on allegations of illegal conduct, adversarial hearings are the norm. It is true that pretrial hearings in criminal prosecutions can in some cases raise special concerns, such as a fear of witness intimidation, but when such circumstances and concerns arise, they can be managed here as they are in other contexts. For example, the government can seek reasonable limitations on the scope of the adversarial hearing and its ability to use hearsay at the hearing, 21 U.S.C. § 853(e)(3), gives it some flexibility in the witnesses it selects when seeking to meet its burden.

While there may be some minor burden upon the government, it plainly does not outweigh or justify the seizure of property without any meaningful post-deprivation hearing and the harm to the Sixth Amendment right to counsel that results from that deprivation of due process. Not having any real identifiable harm, the government has instead argued that such a hearing would trample upon the province of the grand jury to render a probable cause determination. This argument is nothing but sleight of hand. The government is seeking to use this check on a prosecutor's authority to initiate criminal proceedings as a license to seize property (and impair the defendant's ability to retain counsel of choice), without any meaningful adversarial proceeding to challenge that deprivation. Such arguments cannot be squared with basic principles of due process.

ARGUMENT

I. SECTION 853(E)(1)(A) SHOULD BE READ TO AFFORD A MEANINGFUL POST-DEPRIVATION HEARING

This Court has repeatedly held that "it is a cardinal principle" of statutory interpretation that when an Act of Congress raises "a serious doubt" as to its constitutionality, "this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). As explained in *Pearson v. Callahan*, 129 S. Ct. 808, 821 (2009), it is "older, wiser judicial counsel 'not to pass on questions of constitutionality * * * unless such adjudication is unavoidable.'" (quoting *Scott v. Harris*, 550 U.S. 372, 388 (2007) (Breyer, J., concurring) (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944))). *See also Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); *United States v. Jin Fuey Moy*, 241 U. S. 394, 401 (1916) (Holmes, J.).

In *Zadvydas*, for example, this Court read an implicit limitation into an immigration statute authorizing indefinite detention in order to avoid unconstitutionality under the Due Process Clause. *See* 533 U.S. at 688-99. Likewise, here there is a serious doubt about the constitutionality of the statute

at issue, unless it is properly read to conform to the requirements of due process.

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972) (quoting *Baldwin v. Hale*, 68 Wall. 223, 233 (1863)). The right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Id.* (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Thus, the Due Process Clause of the Fifth Amendment generally requires "notice and an opportunity to be heard prior to the deprivation of a property interest." *United States v. Property at 4492 S. Livonia Rd., Livonia*, 889 F.2d 1258, 1263 (2d Cir. 1989). *See also Fuentes*, 407 U.S. at 82 ("the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect"); *James Daniel Good*, 510 U.S. at 48, ("[o]ur precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property").

Only in "extraordinary situations" may notice and a hearing be postponed until after the deprivation. *Fuentes*, 407 U.S. at 90. "[W]here a State must act quickly, or where it would be impractical to provide predeprivation process," the government can be excused from providing a meaningful pre-deprivation hearing. *Gilbert v. Homar*, 520 U.S. 924, 930 (1997). In such cases, however, the fundamental principles of due process demand a post-deprivation hearing that

must be both timely and meaningful. Whether pre- or post-deprivation, "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner," *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted).

In the present case, the government seized property of petitioners pursuant to an *ex parte* proceeding and *ex parte* order issued under 21 U.S.C. § 853(e). The government used the grand jury's *ex parte* probable cause determination in issuing an indictment to then seek an *ex parte* order seizing almost all of petitioners' property. The seizure deprives them of assets they need in order to pay counsel to defend them from the criminal charges they face in this case.

Petitioners are not challenging the power of the government to seek and obtain such a seizure order without any notice or opportunity to be heard by the parties being deprived of their property. Rather, the only question is whether petitioners have a due process right to a timely and meaningful post-deprivation hearing. There can be little doubt that if the statute is construed to deprive petitioners of a timely and meaningful post-deprivation hearing there would be, at a minimum, a very serious doubt as to whether the statute was unconstitutional. Thus, if it is possible to give the statute a fair reading providing such a meaningful post-deprivation hearing, then such a reading is required.

Given the serious constitutional concerns raised by a contrary reading, Section 853(e) is properly con-

strued to afford such a right to a meaningful post-deprivation hearing. The statute expressly speaks to a "hearing held pursuant to this subsection," where the court would receive and consider "evidence and information," even such evidence "that would be inadmissible under the Federal Rules of Evidence." 21 U.S.C. § 853(e)(3). The nature of such hearings and the full scope of when they are required are undefined by the statute. *United States v. Monsanto*, 924 F.2d 1186, 1199 (2d Cir. 1991) (en banc). Thus, the plain language of the statute can and, given the serious constitutional concerns, should be read to afford a meaningful post-deprivation hearing, challenging all aspects of the *ex parte* order, including the critical finding, underlying the order, of probable cause. *Id.* at 1199-1200 ("In light of the statutory silence and the ambiguous legislative history, we do no violence to congressional intent by ruling that grand jury determinations of probable cause may be reconsidered by district courts in ruling upon the continuation of post-indictment restraining orders").

It is true that a Senate Report in Section 853's legislative history suggests that any post-indictment hearing should not "look behind" the grand jury's determination of probable cause to indict the defendant on the offenses as to which forfeiture is sought. *See* S. Rep. No. 98-225 at 203, 213 (1983). The Senate Report, however, "gave no consideration to the constitutional issue that we are required to decide in connection with its assertion that grand jury determinations of probable cause are not to be reconsidered." *Monsanto*, 924 F.2d at 1199. The legislative history is not a sufficient ground to adopt a construction of the statute that would render it unconstitutional—

and no doubt raises very serious constitutional concerns. *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) ("Congress * * * we assume legislates in the light of constitutional limitations").

Moreover, as the Second Circuit recognized in *Monsanto*, "[t]he Senate Report * * * is not the sole legislative history that bears upon this question." 924 F.2d at 1199. A House of Representatives report accompanying an earlier version of the 1984 amendments stated: "Nothing in [the forfeiture] section is intended to interfere with a person's Sixth Amendment right to counsel." H. Rep. No. 98-845, pt. 1, at 19 n.1 (1984).

And as detailed below, the notion that a grand jury determination—which is intended to serve as a check on the power of the prosecutor—can be used as a license to deprive a person of property (and the funding necessary to exercise the right to select their counsel of choice), without any meaningful post-deprivation process, is misguided and without any constitutional foundation.

II. DUE PROCESS REQUIRES A MEANINGFUL AND TIMELY ADVERSARY POST-DEPRIVATION HEARING AT WHICH THE PARTY BEING DEPRIVED OF PROPERTY MAY CHALLENGE ALL ASPECTS OF THE *EX PARTE* SEIZURE ORDER

A. The *Mathews v. Eldridge* Test Provides The Appropriate Due Process Analysis In This Context

The court of appeals erroneously looked to the four-factor test set out in *Barker v. Wingo*, 407 U.S. 514 (1972), when evaluating the due process challenge here. That test, however, sets out factors for analyzing "speedy trial cases on an ad hoc basis." *Id.* at 530. That context and the factors deemed relevant to that context, *see id.* ("[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant"), are wholly inapposite to the context here where the question is what post-deprivation process is due.[2]

This Court applied the *Wingo* factors in *United States v. Eight Thousand Eight Hundred and Fifty Dollars*, 461 U.S. 555, 562 (1983), a seizure case. The issue there, however, was not the right to or the nature of the due process hearing. Rather, the issue was, as in *Wingo*, a challenge to delays by the government. *Id.* at 564 ("the Fifth Amendment claim here *

---

[2] *United States v. Von Neumann*, 474 U.S. 242 (1986), applying *Barker*, likewise focused on the reasonableness of delay.

* * challenges only the length of time between the seizure and the initiation of the forfeiture trial").

Rather than the *Wingo* factors, which address timeliness issues, the appropriate analytical framework in this case—which concerns the right and nature of process due—is set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The *Mathews* framework examines three factors: the "private interest affected by the official action; the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and the Government's interest, including the administrative burden that additional procedural requirements would impose." *James Daniel Good*, 510 U.S. at 53. These are the factors to which the Court has repeatedly looked in measuring the "specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair." *Turner v. Rogers*, 131 S. Ct. 2507, 2517 (2011).

Notably, this Court, in *James Daniel Good*, analyzed the constitutionality of an *ex parte* seizure of real property using the guidance set forth in *Mathews*.[3] There as here, the issue was not delay, but the right to a meaningful hearing to address the propriety of a seizure. 510 U.S. at 53-54. That *James Daniel Good* involved an interest in real property is not a meaningful distinction. *See City of Los Angeles v. David*, 538 U.S. 715 (2003) (per curiam) (applying

---

[3] In a concurring and dissenting opinion, Justice O'Connor agreed that *Mathews* provided the appropriate analytical framework for evaluating whether the seizure violated the Due Process Clause. 510 U.S. at 513.

Mathews to evaluate a deprivation of money used to secure release of a seized vehicle).

As in *James Daniel Good*, the challenge here is not based on delay in instituting an action. To the contrary, it was the initiation of the action by indictment that provided the basis for the *ex parte* protective order. The question here is whether the Kaleys have a right to a post-restraint hearing to challenge the restraints and, if so, what procedural safeguards should be built into the hearing. Thus, as in *James Daniel Good*, *Mathews* provides the appropriate framework for evaluating what process is due. *See, e.g.*, *United States v. Monsanto*, 924 F.2d 1186, 1193 (2d Cir. 1991) (en banc) (applying *Mathews* in addressing hearing rights under Section 853); *United States v. E-Gold, Ltd.*, 521 F.3d 411, 415 (D.C. Cir. 2008) (same); *United States v. Holy Land Found. for Relief & Dev.*, 493 F.3d 469, 475 (5th Cir. 2007) (en banc) (collecting cases).

B. The Private Interest Is Weighty, Encompassing Not Only Defendants' Interest In The Restrained Assets, But Also Their Liberty Interests In Counsel Of Choice And Avoiding Incarceration

1. The first factor analyzed under *Mathews* is the private interest. Here, the most immediate interest at stake is the individual's property interest in "enjoy[ing] what is his, free of governmental interference." *Fuentes*, 407 U.S. at 81. The Constitution places a "high value" on this private interest. *Id.*; *see also James Daniel Good*, 510 U.S. at 61 ("Individual freedom finds tangible expression in property

rights."). That the deprivation is temporary is inconsequential. "[E]ven * * * temporary or partial impairments to property rights * * * merit due process protection." *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991). How the defendant wishes to exploit the economic value of his property usually makes little difference in the calculus. It is the defendant's property to do with as he wishes in the absence of a valid restraint or seizure.

2. The import of a property interest is enhanced where, as here, the party has a vital, time-sensitive need for the property. *See Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (without a meaningful hearing the welfare recipient lacks the "means by which to live while he waits"); *Walters v. Nat'l Assoc. of Radiation Survivors*, 473 U.S. 305, 332-33 (1985) (distinguishing *Goldberg* as a case that implicated benefits conferred on the basis of need). This Court has recognized, moreover, that one important due process interest may supplement another. *See Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 31 (1981) ("To summarize the above discussion of the *Eldridge* factors: the parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings) * * * ").

Here, not only has almost all of petitioners' property been restrained by an *ex parte* order, that restraint now prevents them from being able to hire counsel to represent them in facing serious criminal charges. The restraint here implicates and significantly impairs petitioners' Sixth Amendment right to counsel. In the context of a federal criminal trial the

erroneous deprivation of the right to a person's counsel of choice introduces "structural" error, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006), because it "undermine[s] the fairness of [the] criminal proceeding as a whole," *United States v. Davila*, No. 12-167, slip op. at 12 (U.S. June 13, 2013). In fact, this Court has recognized the "reality" that one's choice of attorney can profoundly affect not just the course, but also the outcome, of a criminal case: "[T]he quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 630 (1989) (internal quotation marks omitted). Plainly, a criminal defendant has a "strong and legitimate interest in ensuring that probable cause is adequately established at a pretrial hearing before he is effectively deprived of counsel of choice as a result of a pretrial restraint of his assets." *Monsanto*, 924 F.2d at 1194 (internal quotation marks omitted).

In the government's view, the defendant's trial is his only opportunity to fully contest the *ex parte* restraint. *See* Br. in Opp. 15-16. By that time, the deprivation of the right to counsel of choice will have been complete and irreparable. To prevent that harm, there needs to be a meaningful hearing under Section 853(e), where the deprived party can present evidence and challenge the validity and basis of the *ex parte* seizure order.

3. Where an erroneous restraining order precludes a defendant from retaining counsel of choice, the risk of error at trial also increases. This follows inexorably from "the harsh reality that the quality of

a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy." *Caplin & Drysdale*, 491 U.S. at 630 (internal quotation marks omitted). Both anecdotal and empirical evidence show that poor legal representation is a leading cause of wrongful convictions. *See, e.g.*, Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 114-16 (2008); John B. Gould, et al., *Predicting Erroneous Convictions: A Social Science Approach to Miscarriages of Justice* 81-82, 97 (2012) (report to the U.S. DOJ), *available at* https://ncjrs.gov/pdffiles1/nij/grants/241389.pdf.

Not only do erroneous restraints deprive defendants of their preferred counsel, but in many cases they shift the defense burden to already overworked and underfunded public defenders and court-appointed counsel. While federal prosecutors and investigators are amply funded through seized property, public defenders at both the federal and state level face crushing caseloads and woefully inadequate resources. *E.g.*, Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense 14-19* (ABA 2011) (describing excessive caseloads as "a pervasive national problem"). The Florida Supreme Court recently held that the Miami public defender's office had established cause to withdraw from numerous felony cases because it had more clients than it could adequately represent. *Public Defender v. Florida*, Nos. SC09–1181, SC10–1349, 2013 WL 2248965 (Fla. May 23, 2013). Courts in other states have reached similar conclusions. *See* Note, *Effectively Ineffective: The Failure of Courts To Address Underfunded Indigent Defense Systems*, 118 Harv. L. Rev. 1731 (2005)

(discussing cases). When public defenders' offices already lack the resources to effectively represent their current clients, increasing their caseloads—with cases that are often complex—inevitably increases the risk of wrongful convictions. Erroneous restraints also increase the risk of convicting the innocent where the frozen assets are needed to hire forensic experts or to pay for other investigative or legal defense costs. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009) ("One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases."); *see also* Rachel Burg, Note, *Un-Convicting the Innocent: The Case for Shaken Baby Syndrome Review Panels*, 45 U. Mich. J. L. Reform 657, 657-60 (2012).

In sum, the deprivation of property here impairs fundamental constitutional rights and may cause two innocent defendants to be sent to prison for years. As Judge Edmondson explained in this case:

> By freezing a citizen's property at a time when he is presumed innocent of crime, the citizen * * * is subjected to severe hardship. The hardship includes in this case the inability to employ counsel of Defendants' choice to defend them in court from the mighty power of the federal government in a criminal proceeding. In the criminal proceeding ultimately, both their liberty and their property will be at stake. The chips are down.

United States v. Kaley, 677 F.3d 1316, 1330 (11th Cir. 2012) (*Kaley II*) (Edmondson, J., concurring in the result).

C. The Risk Of Erroneous Deprivation Weighs Heavily In Favor Of A Meaningful And Timely Post-Deprivation Hearing

1. The Grand Jury Procedure Is Not An Effective Safeguard Against Erroneous Pretrial Restraints

A high risk of error inheres in *ex parte* proceedings of the kind used by the government below to secure the assets for forfeiture pending trial. Because "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights," *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring), this Court has long recognized the considerable value of adversarial testing in preventing "substantively unfair and simply mistaken deprivations." *Fuentes*, 407 U.S. at 81.

This Court's analysis in *James Daniel Good* is instructive. In holding that due process requires an adversarial hearing before the government may seize real property it claims is forfeitable, this Court determined that "[t]he practice of *ex parte* seizure * * * creates an unacceptable risk of error." *James Daniel Good*, 510 U.S. at 55. There, as here, the government proceeded *ex parte*. The Court noted that the government was not required to present through the affidavit of an agent any potential defenses at the seizure

proceeding and emphasized that even if it were, the missing element of adverseness by itself would render the *ex parte* proceeding constitutionally deficient. *Id.*

The same shortcomings beset grand jury proceedings. In fact, in the present context there is even a greater need for meaningful post-deprivation review than in the context of the seizure warrant in *James Daniel Good*. In the seizure warrant context, the affiant has an obligation to conform his or presentation of the facts to the requirements of the Fourth Amendment, *see One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), including the requirement to make a truthful factual showing to the magistrate, *see Franks v. Delaware*, 438 U.S. 154, 164-65 (1978). In grand jury proceedings, in contrast, the government is not constitutionally obligated to present exculpatory evidence. *United States v. Williams*, 504 U.S. 36, 51-52 (1992). If anything, a seizure based only on the strength of a grand jury's indictment presents an even greater risk of error than the seizure pursuant to a law enforcement agent's affidavit in *James Daniel Good*.[1]

Given the defining features of the federal grand jury, it is "not a mechanism well designed to protect a defendant against an erroneous deprivation." *United States v. Kaley*, 579 F.3d 1246, 1267 (11th Cir. 2009) (*Kaley I*) (Tjoflat, J., specially concurring). Experience bears this out. Grand juries indict in 99 percent

---

[1] The government here also submitted an agent's *ex parte* affidavit to support the Section 853(e)(1)(A) protective order. But that merely raises the same kinds of risks as did the affidavit in *James Daniel Good*.

of the cases presented to them. Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. Crim. L. & Criminology 1171, 1176 (2008).

2. Rubber Stamp Grand Juries Are Improperly Being Used In An Attempt To Insulate Seizure Orders From Review

The government not only uses the rubber stamp of the grand jury to initiate criminal proceedings at the discretion of the prosecutor, but also as a mechanism for maximizing the assets that can be seized, while seeking to minimize the rights of the party subject to a seizure order. The government's view is that it has no constitutional or statutory obligation to present forfeiture allegations to the grand jury. *See* U.S. Dep't of Justice, *Asset Forfeiture Policy Manual* at 120-123 (2012). Nonetheless, it regularly does so. The government's forfeiture policies encourage prosecutors to ask the grand jury to return an indictment on both the substantive charges and the nexus determination underlying the forfeiture allegation. *See id.* at 123-125.

This is done in an attempt to limit or eliminate the defendant's ability to challenge the subsequent seizure order. The government presents the indictment to the district court in its *ex parte* Section 853(e)(1)(A) application to show probable cause as to the alleged crime *and* the nexus to the claimed assets. *See id.* at 128. In essence, the government seeks to

use the grand jury finding to relieve itself of the burden of presenting evidence or information subject to adversarial testing.

The grand jury was originally intended to be a check on the power of the prosecutor. Its historic role was to be the "protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." *United States v. Dionisio*, 410 U.S. 1, 17 (1973). Ironically, here it is being used to expand the power of the prosecutor and to insulate seizures of property (and the resultant harm to a defendant's Sixth Amendment rights) from any meaningful post-deprivation review. Only through a meaningful post-deprivation Section 853 hearing will such abuses be checked.

3. The Government's Growing Dependency On And Direct Pecuniary Interest In Forfeiture Strongly Support The Need For Meaningful Post-Deprivation Review

In *James Daniel Good*, this Court emphasized that an adversary deprivation hearing was particularly important in a seizure case because of the government's "direct pecuniary interest" in the proceeding. 510 U.S. at 55-56. As evidence of that interest, the Court cited a 1990 memo in which the Attorney General urged United States Attorneys to make "'[e]very effort * * * to increase forfeiture income'" in order to meet the Department of Justice's annual budget projection of *$470 million*. *Id.* at 56

n.2 (quoting Executive Office for United States Attorneys, U.S. Dept. of Justice, 38 *United States Attorney's Bulletin* 180 (1990)).

At that time, the government's desire to use its forfeiture power to raise the sum of $470 million seemed shocking. It raised the prospect that the government's focus upon core values of justice and fairness were being skewed by its appetite for revenue. When *James Daniel Good* was decided, there were good grounds for concern that the siren song of non-appropriated revenues from seizures of property could warp our criminal justice system. Today, that concern of a potential dependency on forfeiture funds has been fully realized. What was a potential danger of dependency has turned into a full-blown addiction.

Describing the growth of the government's forfeiture program, one of the Department of Justice's leading forfeiture experts has written:

> Asset forfeiture came into prominence as a law enforcement tool in the United States during the 1990s. At the beginning of that decade, the Department of Justice—the principal federal law enforcement agency—was forfeiting approximately $200 million per year in criminal assets, mostly from drug cases. By the end of the decade it was forfeiting more than $600 million per year in assets involved in an enormous variety of serious crimes.

Stefan D. Cassella, *Asset Forfeiture Law In the United States*, § 2.1 (2d ed. 2013) (citing statistics provided by the Asset Forfeiture Management Staff of the U.S. Department of Justice).[5]

If the growth in the government's asset forfeiture program in the 1990s marked forfeiture's emergence into prominence, what has happened since then marks forfeiture's institutionalization "as an essential weapon in the arsenal that the federal law enforcement agencies in the United States could bring to bear on the perpetrators of crime." *Id.* In fiscal year 2012, the DOJ Assets Forfeiture Fund received ***$4.165 billion*** in net forfeiture revenue—nearly ten times the $470 million target the Court quoted in *James Daniel Good*.[6] This represents a significant increase from the $1.732 billion in net forfeiture revenue in FY 2011 and reflects a recent upward trend.

---

[5] By the end of the 1990s, the DOJ Assets Forfeiture Fund had not yet reached $600 million in annual forfeitures. *See* Table 1 below. The $600 million figure stated in Mr. Cassella's treatise may reflect the combined receipts of the Justice and Treasury forfeiture funds.

[6] U.S. Dep't of Justice, Audit Report 13-07, Assets Forfeiture Fund Annual Financial Statements Fiscal Year 2012, at 9 (2013). The DOJ's Assets Forfeiture Fund has a sister fund called the Treasury Forfeiture Fund. *See* United States Government Accountability Office, GAO-12-972, *Asset Forfeiture Programs: Justice and Treasury Should Determine Costs and Benefits of Potential Consolidation*, (September 2012) (describing the two funds and urging study of whether to consolidate them). In 2011, the Treasury Forfeiture Fund recovered an additional $868 million in forfeited assets beyond what the DOJ Assets Forfeiture Fund recovered. In 2012, it recovered an additional $516 million.

As shown in Table 1 below, in the late 1990s and early 2000s, the DOJ's annual forfeiture revenues were in the same ballpark as the $470 million projection referenced in *James Daniel Good*, reaching a high of $494.2 million in FY 1999. Beginning in FY 2006, however, net forfeiture revenues climb upward and have not slid back.

Table 1[7]

Fiscal Year	Net Forfeiture Revenue – AFF
1996	$309,000,000
1997	$374,900,000
1998	$366,800,000
1999	$494,200,000
2000	$378,600,000
2001	$381,700,000
2002	$398,600,000
2003	$466,000,000
2004	$443,500,000
2005	$585,400,000
2006	~ $1,100,000,000[8]
2007	~ $1,500,000,000
2008	$1,221,000,000

[7] The revenue figures in this table are taken from the annual financial statements for the DOJ's Assets Forfeiture Fund and Seized Asset Deposit Fund, *available at* http://www.justice.gov/jmd/afp/01programaudit/.

[8] Because the forfeiture revenue figures for 2006 and 2007 are depicted in a bar graph in the annual financial statements, the figures in Table 1 represent conservative estimates. *See* U.S. Dep't of Justice, Audit Report 08-14, Assets Forfeiture Fund Annual Financial Statements Fiscal Year 2007, at 10 (2008).

2009	$1,402,000,000
2010	$1,542,000,000
2011	$1,732,000,000
2012	$4,165,000,000

The growth in forfeiture recoveries beginning in 2006 coincides with the Justice Department's increased use of asset forfeiture in fraud and financial crime cases. United States Government Accountability Office, GAO-12-736, *Justice Assets Forfeiture Fund, Transparency of Balances and Controls over Equitable Sharing Should Be Improved*, at 11 (July 2012) ("Since 2006, an increase in the prosecution of fraud and financial crime cases has led to substantial increases in AFF revenue").

The sophistication of the government's forfeiture program has grown commensurate with the increase in forfeiture revenues. Gone are the days when the Justice Department set forfeiture objectives by jotting off internal memoranda. Today, the Justice Department maintains a policy manual devoted to asset forfeiture.[9] It sets asset forfeiture goals and objectives through a 78-page National Asset Forfeiture Strategic Plan.[10] That strategic plan includes traditional forfeiture objectives, such as taking the profit out of crime, but it also emphasizes spending forfeiture revenues to expand the government's forfeiture program.

---

[9] *See* DOJ, Asset Forfeiture Policy Manual (2012), *available at* http://www.justice.gov/criminal/afmls/pubs/pdf/pm-2012.pdf.

[10] *See* DOJ, National Asset Forfeiture Strategic Plan 2008-2012, *available at* http://www.justice.gov/criminal/afmls/pubs/pdf/strategicplan.pdf.

See Nat'l Asset Forfeiture Strategic Plan, at 25 (stating that a "critical cornerstone" of the plan is to "[o]btain the funding and tools required to sustain and enhance asset forfeiture investigations, prosecutions, and Program operations"); *see also id.* at 39 (stating the Department's objective to "[i]ntegrate asset forfeiture in all appropriate investigations and cases").

While today some of the seized assets ultimately find their way to victims as restitution, that is not the case with the seizure at issue here.[11] Nor does it negate the reality of the government's growing dependency on seized funds. Virtually every federal investigative agency and prosecuting authority has a significant financial stake in the success of the government's two forfeiture funds. For example, the DOJ forfeiture fund makes annual allocations to supplement the investigatory and prosecutorial budgets of the following agencies: the FBI; DEA; Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); Organized Crime Drug Enforcement Task Force (OCDETF); Executive Office for United States Attorneys (EOUSA); the Criminal Division's Asset Forfeiture and Money Laundering Section (AFMLS); and

---

[11] *See United States v. Kaley*, No. 07-80021-CR-MARRA/Seltser, Dkt. No. 70-1, at 11 (Apr. 27, 2007) (where the government indicates it cannot make restitution because of poor recordkeeping by medical facilities).

the U.S. Marshals Service.[12] Table 2 shows the generous allocations several of these agencies received in fiscal year 2012:

Table 2[13]

Agency	Forfeiture Operation Expenses	General Investigative Expenses
DEA	$161,038,000	$50,232,000
FBI	$43,538,000	$41,305,000
ATF	$33,070,000	$11,600,000
OCDETF	$23,697,000	$28,729,000

In that same fiscal year, $30,279,000 from the DOJ forfeiture fund was allocated to EOUSA, and

---

[12] The Treasury forfeiture fund makes annual appropriations to its member agencies, which include the Secret Service, IRS Criminal Investigation, and various law enforcement agencies within the Department of Homeland Security. *See* Treasury Forfeiture Fund Accountability Report, Fiscal Year 2012, at 1, *available at* http://www.treasury.gov/resource-center/terrorist-illicit-finance/Asset-Forfeiture/Documents/FY%202012%20Annual%20Report.pdf.

[13] Assets Forfeiture Fund, Total Expenses Paid from Fund by Category of Expense and Recipient Agency: Expenses of Federal Agencies – FY 2012, *available at* http://www.justice.gov/jmd/afp/02fundreport/2012affr/report2a.html.

$37,583,000 to AFMLS, for prosecutorial and investigative expenses.[14]

These expenditures occur outside of the regular legislative appropriations process. The only limit on the amount of money the government can spend on forfeiture-related operations and investigative costs is the amount it can recover from criminal defendants and other alleged wrongdoers. *See* 28 U.S.C. § 524(c) (setting forth the statutory limits on expenditures of money from the DOJ Assets Forfeiture Fund); 31 U.S.C. § 9703 (same for Treasury Forfeiture Fund).[15]

In summary, today, the government not only has "a direct pecuniary interest in the outcome of the proceeding," *James Daniel Good*, 510 U.S. at 56, it has a growing addiction to the type of funds that are subject to the *ex parte* restraining order at issue here. In this context, a timely adversary hearing is necessary to provide the requisite neutrality and due process that is missing from a prosecution-driven *ex parte* process.

4. The Opportunity To Contest Probable Cause As To The Underlying Charges Is Imperative Given The Government's Incentive To Maximize The Assets It Can Restrain By Over-Charging Criminal Cases

In a criminal case like the Kaleys', prior to conviction the government ordinarily may seize or restrain

---

[14] *See id.*

[15] Congress mistakenly codified two Section 9703s.

only directly forfeitable assets.[16] An asset is directly forfeitable if it bears the requisite statutory nexus to the offense conduct giving rise to forfeiture.[17]

Because the government's restraint authority is tied directly to the predicate offense, the temptation exists for the government to include charges that support expansive forfeiture theories. This temptation to over-charge is particularly great with regard to money laundering. The money laundering forfeiture statutes authorize the forfeiture of any property "involved in" a money laundering transaction, 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1), and courts have broadly construed this language. *See, e.g., United States v. Huber*, 404 F.3d 1047, 1058 (8th Cir. 2005); *United States v. McGauley*, 279 F.3d 62, 71 (1st Cir. 2002) (transfer of $99,000, of which only $155 is fraud proceeds, is a money laundering offense, rendering the entire $99,000 forfeitable); *see also* Cassella, *supra*, §

---

[16] *See United States v. Gotti*, 155 F.3d 144, 149 (2d Cir. 1998); *In re Assets of Martin*, 1 F.3d 1351, 1357-58 (3d Cir. 1993); *United States v. Floyd*, 992 F.2d 498, 501-02 (5th Cir. 1993); *United States v. Parrett*, 530 F.3d 422, 430-31 (6th Cir. 2008); *United States v. Field*, 62 F.3d 246, 249 (8th Cir. 1995); *United States v. Ripinsky*, 20 F.3d 359, 363 (9th Cir. 1994); *but see United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001).

[17] The requisite nexus varies by crime. For example, the general forfeiture statute for crime proceeds authorizes the forfeiture of property that "constitutes or is derived from proceeds traceable to a violation of" numerous federal offenses. 18 U.S.C. § 981(a)(1)(C), § 982(a)(2). For money laundering offenses, any property "involved in" the transaction, or traceable thereto, is directly forfeitable. 18 U.S.C. § 981(a)(1)(A), § 982(a)(1).

1-3 at 8 ("[P]rosecutors like to use the money laundering forfeiture statute because it eliminates the need, in most cases, to distinguish between the portion of the property traceable to the underlying offense and the portion derived from other sources.").

This case exemplifies the breadth of the government's money laundering forfeiture authority, and perhaps also the strength of its temptation to bring questionable money laundering charges to maximize the assets it can seize and eventually forfeit. After the magistrate judge reduced the initial protective order from $500,000 to $140,000—the amount he found to be traceable to the charged offenses—the government sought and obtained a superseding indictment that added a money laundering charge. Pet. App. 51-52. The government then sought and obtained a second restraining order that again froze the entire $500,000, this time on the theory that the full amount was "involved in" the alleged money laundering. Pet. App. 53-54. The Kaleys moved to strike this new forfeiture allegation as "vindictive," in retaliation for their having successfully challenged the breadth of the initial restraining order. Pet. App. 52-53 n.9. The court denied the motion. *Id.*

Especially given the government's incentive to over-charge, an adversary hearing at which the defendant can contest *all* aspects of the restraining order—including probable cause to support the underlying charges—is imperative.[18]

---

[18] The government may also be tempted to over-charge and over-restrain in order to face a weaker defense at trial. *See Kaley*

5. The Complexity Of The Factual And Legal Issues Militates In Favor Of An Adversary Hearing

Complex issues of fact and law are "ill-suited" for *ex parte* adjudication and "inherently subject to * * * adversarial input." *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 617-18 (1974). Pretrial seizures and restraints of assets for forfeiture routinely give rise to complicated and contestable matters.

Complex issues abound, for instance, with regard to whether the government can establish the required nexus between the charged offenses and the property it seeks to restrain. One recurring issue is whether the government may restrain and forfeit gross, or only net, proceeds of certain unlawful transactions. *E.g.*, *United States v. Mahaffy*, 693 F.3d 113 (2d Cir. 2012). Another is whether and under what legal standard the Government can trace crime proceeds once they become commingled with lawfully derived funds. *See In re Rothstein, Rosenfeldt, Adler, P.A.*, No. 11-10676, 2013 WL 2494980, at *3-5 (11th Cir. June 12, 2013). Similarly, the question of what property qualifies as "proceeds" continues to generate litigation, as does the related question of what it means to obtain proceeds as a result of the charged criminal activity. *See, e.g.*, *United States v. Contorinis*, 692 F.3d 136, 145-

---

I, 579 F.3d at 1266 (Tjoflat, J., specially concurring) ("A prosecutor has everything to gain by restraining assets that ultimately may not be forfeited. By doing so, he can stack the deck in the government's favor by crippling the defendant's ability to afford high-quality counsel.").

148 (2d Cir. 2012).[19]

Moreover, facilitating property forfeitures—such as the government's "involved in" money laundering theory in this case[20]—frequently raise fact-intensive issues. To restrain and forfeit facilitating property, the government must establish a "substantial connection" between the property and the offense. 18 U.S.C. § 983(c)(3). Even where the government proves this statutory nexus, its theory may raise difficult factual and legal issues under the Excessive Fines Clause. *See United States v. Bajakajian*, 524 U.S. 321 (1998) (holding that the forfeiture of $357,144 for a currency reporting offense was grossly disproportionate to the gravity of the offense under the Excessive Fines Clause); *see also James Daniel Good*, 510 U.S. at 81 n.2 (Thomas, J., concurring in part and dissenting in part) (explaining that "like the majority, I am disturbed by the breadth of" the statute authorizing facilitating property forfeitures and pointing to the Excessive Fines Clause as an important substantive limit).

Without adversary presentation, the risk of an erroneous determination of these complex issues is clamant.

---

[19] And forfeiture law is "ever-evolving" and "a moving target," with federal courts issuing new forfeiture decisions at a rate of 10-15 per week. Cassella, *supra*, at xxxiii-xxxiv.

[20] *See United States v. Tencer*, 107 F.3d 1120, 1134 (5th Cir. 1997).

6. A Pretrial Adversary Hearing Would Reduce Erroneous Deprivations Of Choice Of Counsel By Minimizing Uncertainty About The Legitimacy Of The Defendant's Assets

The Department of Justice's own guidelines recognize how directly seeking forfeiture of the payment of an attorney's fee is destructive to the constitutional right to counsel. U.S. Attorney's Manual 9-120.111 (added May 2010) ("Sending written notice of the forfeitability of assets that are not specifically described or under restraint no doubt would be attacked as impermissibly interfering with the qualified right to counsel of choice"). Nonetheless, the government can and does seek to seize funds paid as attorney fees. *Compare United States v. Moffitt, Zwerling & Kemler*, 83 F.3d 660 (4th Cir. 1996); *United States v. McCorkle*, 321 F.3d 1292, 1294 (11th Cir. 2003); *United States v. Saccocia*, 354 F.3d 9, 14-15 (1st Cir. 2003); *United States v. Swiss Am. Bank*, 191 F.3d 30, 37 (1st Cir. 1999) *with United States v. Bailey*, 419 F.3d 1208 (11th Cir. 2005). In one high-profile case in South Florida, an attorney was criminally prosecuted for advising another attorney concerning the source of funds used to retain counsel. *United States v. Velez*, 586 F.3d 875 (11th Cir. 2009) (reversing money laundering convictions of attorney retained by a criminal defense lawyer to vet the source of client funds used to pay defense fees).

Unless there can be meaningful post-deprivation review of an *ex parte* seizure order, counsel will be deterred in accepting payments from clients who are

likely to be charged with federal offenses that can be linked by the government to broad forfeiture claims. The concerns are even greater in Florida. There, counsel are subject to rules of practice, such as Southern District of Florida's Local Rule 88.7, that have the effect of encouraging retained counsel to secure their entire fee up front.[21] The attorney who fails at the front end to secure those fees "sufficient to provide for representation" through trial, will not, after arraignment, be permitted to withdraw if he or she is not getting paid. *Id.*

The effect of these rules, and the uncertainty that hangs over the question of fee forfeitures, all point to the need for a robust post-deprivation/pre-trial hearing process to air challenges to asset restraints or seizures for criminal forfeiture. The ability to raise such challenges at or near the time the criminal prosecution is initiated promotes certainty in the controversial area of fee forfeitures. It also enables retained counsel to make satisfactory arrangements to secure the funds needed to see a case through trial, particularly in those jurisdictions with rules that encourage early resolution of fees.

---

[21] *See* S.D. Fla. Local Rule 88.7 ("Retained criminal defense attorneys are expected to make financial arrangements satisfactory to themselves and sufficient to provide for representation of each defendant until the conclusion of the defendant's case at the trial level"); *see also* 11th Cir. Rule 46-10(a).

D. The Government's Interests Are Outweighed By The Other *Mathews* Factors And Can Be Adequately Protected In The Few Cases In Which They Are Significantly Threatened

1. Requiring a meaningful post-deprivation hearing under Section 853 will not present any significant burden upon the government. It would, of course, impose the requirement of participating in an adversarial hearing, if the government wishes to continue to deprive the person of his assets and the right to select his counsel of choice. Given that the government has already marshaled its evidence for the grand jury and believes that it has adequate documentation and testimony to support a finding of probable cause, the burden of such participation will not be great.

Indeed, in other contexts, such adversarial hearings regarding restrained assets are routine. For example, 18 U.S.C. § 1345(a)(2) empowers the Attorney General to commence a civil action to enjoin a person from "alienating or disposing of property" obtained as a result of a banking law violation or federal health care offense. The statute contemplates that if the Attorney General seeks to enjoin such activity he or she may seek a "restraining order" consistent with the requirements of the Federal Rules of Civil Procedure.[22] Recognizing that there will be instances when the Government seeks relief under Section 1345 and

---

[22] Though awkwardly phrased, the statute has been construed to refer to injunctive relief of the kind contemplated by Rule 65. *United States v. DBB, Inc.*, 180 F.3d 1277 (11th Cir. 1999).

charges a wrongdoer criminally, the statute makes accommodation. "A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure."

Similarly, federal regulatory agencies like the Securities and Exchange Commission, the Federal Trade Commission and the Commodities Futures Trading Commission, frequently bring civil actions that seek to restrain or seize the assets of a wrongdoer, including those who have been indicted. Not uncommonly, lawyers for those agencies have access to many of the same kinds of sensitive information as do criminal prosecutors. Yet when the SEC, FTC and the CFTC seek to restrain or seize assets, they proceed according to the same rules as any other civil litigant.[23] Those rules include the requirements of Rule 65, including the requirement of a preliminary injunction hearing at which the court may hear from witnesses and receive evidence.

Of course, pretrial hearings in criminal prosecutions can in some cases raise special concerns, such as a fear of witness intimidation. Such concerns do not, however, arise in most cases. And when they do arise, they can be managed just as they are in other contexts cited above. For example, the government can seek reasonable limitations on the scope of the adversarial hearing and its ability to use hearsay at the hearing (21 U.S.C. § 853(e)(3)) gives it some flexibility in the

---

[23] *See, e.g.*, 12 U.S.C. § 1818(i)(4) (authorizing banking regulators to restrain assets under Rule 65 standards).

witnesses it selects when seeking to meet its burden. *See E-Gold*, 521 F.3d at 419 (explaining that affording a post-deprivation adversary hearing need not "entail[] an invasion of grand jury secrecy or an eviscer-ation of the important goals of that secrecy", given that "the court could use limitations on the disclosure of evidence, such as in camera hearings and appropri-ate application of the normal rules of evidence to pro-tect the grand jury proceedings against unwarranted invasion"). In any event, such concerns do not justify wholly insulating the *ex parte* seizure order from meaningful post-deprivation review.

2. Contrary to the government's assertion, Br. in Opp. 15-16, permitting a hearing to examine all of the key aspects of the *ex parte* seizure order, including the finding of probable cause, would not trample upon the province of the grand jury. The fact that the prosecu-tor chooses to use the indictment to establish a predi-cate of the seizure order is not a grounds for denying the party being deprived (of both property and the Sixth Amendment right to counsel) a meaningful hearing, which is the essence of due process. *See Mon-santo*, 924 F.2d at 1196-98.

As the Second Circuit recognized in *Monsanto*, "well established jurisprudence concerning due pro-cess protections against deprivations of property," 924 F.2d at 1196, mandates a meaningful opportunity to challenge the basis for the seizure of property. That here includes the "probable cause" finding that was the premise of the *ex parte* restraining order. Those established due process requirements, taken together with "additional sixth amendment considerations at-

tendant upon the deprivation of assets needed to retain counsel of choice," mandate that the defendant have such a right to such a timely post-deprivation hearing *Id.* at 1196-97.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

Michael Ufferman
Florida Association
of Criminal Defense
Lawyers
2022-1 Raymond
Diehl Road
Tallahassee, FL 32308

Karen M. Gottlieb
Florida Capital
Resource Center
100 N. Biscayne
Blvd.
Suite 3070
Miami, FL 33132

Sonya Rudenstine
Attorney at Law
204 W. University
Ave., Ste 5
Gainesville, FL
32601

Courtney J. Linn
Counsel of Record
Robert M. Loeb
Mark Mermelstein
Mona Amer
David W. A. Spencer
Orrick, Herrington &
Sutcliffe LLP
400 Capitol Mall, Suite
3000
Sacramento, California
95819
(916) 447-9200
clinn@orrick.com

July 8, 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

JUL 9 - 2013

No. 12-464

IN THE

Supreme Court of the United States

KERRI L. KALEY, ET VIR, *Petitioners*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Brief *Amicus Curiae* of Gun Owners Foundation, U.S. Justice Foundation, Gun Owners of America, Inc., Downsize DC Foundation, DownsizeDC.org, Institute on the Constitution, Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, Abraham Lincoln Foundation, and Policy Analysis Center in Support of Petitioners

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street
Suite 2
Ramona, CA 92065
Attorney for U.S. Justice Foundation

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
ROBERT J. OLSON
HERBERT W. TITUS
JOHN S. MILES
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

*Counsel of Record

July 8, 2013

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. THE COURT OF APPEALS' PRECLUSION OF A MEANINGFUL RIGHT TO CHALLENGE ASSET SEIZURES IMBALANCES THE FEDERAL CRIMINAL JUSTICE SYSTEM, IMPAIRS A DEFENDANT'S RIGHT TO COUNSEL OF CHOICE, AND VIOLATES DUE PROCESS OF LAW 4

A. Asset Forfeiture Was Disfavored by the Founders 5

B. The Founders Never Intended the Federal Government to Have a Major Role in Criminal Justice Enforcement 8

C. Congress Has Not Remained Faithful to Original Parameters of the Federal Criminal Justice System. 10

D. The Modern Federal Criminal Justice System Operates Oppressively against the People of the United States 13

II. A GRAND JURY INDICTMENT IS NOT AN ACCEPTABLE SUBSTITUTE FOR A POST-INDICTMENT, PRETRIAL HEARING, PRIOR TO SEIZURE OF DEFENDANTS' ASSETS 16

A. A Grand Jury Finding of Probable Cause Is Insufficient to Establish the Predicate for Asset Forfeiture 19

B. The Grand Jury's Modern Investigative Role Does Not Protect against Improper Indictments 24

C. The Grand Jury Does Not Protect the Kaleys from Unconstitutional Acts of Congress 30

D. The Rule that a Defendant May Not Challenge a Grand Jury Indictment Is Not in Jeopardy 32

III. ASSET SEIZURE AT THE DISCRETION OF THE DEPARTMENT OF JUSTICE IS INCONSISTENT WITH THE RULE OF TUMEY V. OHIO 33

CONCLUSION 38

TABLE OF AUTHORITIES

Page

HOLY BIBLE
Jeremiah 1:53 36

U.S. CONSTITUTION
Article I, Section 8, Clause 1 8
Article I, Section 8, Clause 6 8
Article I, Section 8, Clause 7 8
Article I, Section 8, Clause 10 8
Article I, Section 8, Clause 17 8
Article I, Section 8, Clause 18 8
Article II, Section 4 8
Article III, Section 3, Clause 1 8
Amendment V ..... *passim*
Amendment VI ..... *passim*

STATUTES
Act of April 30, 1790, 1 Stat. 112 6
Comprehensive Crime Control Act of 1984, Pub. L. 98-473 34
Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513 7
Comprehensive Forfeiture Act, Pub. L. 98-473 6
Organized Crime Control Act of 1970, Pub. L. 91-452 7
18 U.S.C. § 924 13
18 U.S.C. § 1963 7
21 U.S.C. § 853 ..... 4, 7, 20, 21
28 U.S.C. § 455 36
28 U.S.C. § 524 35
28 U.S.C. § 2461 7

CASES

Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) 25
Beck v. Alabama, 447 U.S. 625 (1980) 15
Blockburger v. United States, 284 U.S. 299 (1932) 15
Calero-Toledo v. Pearson Yacht Leasing, 416 U.S. 663 (1974) 5, 6
Costello v. United States, 350 U.S. 359 (1956) 24, 32
Georgia v. Brailsford, 3 U.S. 1 (1794) 31
Lawn v. United States, 355 U.S. 339 (1958) 24
Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989) 26
Sparf v. United States, 156 U.S. 51 (1895) 31
Tumey v. Ohio, 273 U.S. 510 (1927) ... 3, 34, 35, 36
United States v. Bissell, 866 F.2d 1343 (11th Cir. 1989) 20, 21
United States v. Calandra, 414 U.S. 338 (1974) . 25
United States v. Dionisio, 410 U.S. 1 (1973) 26
United States v. Monsanto, 491 U.S. 600 (1989) . 20
United States v. Rubin, 559 F.2d 975 (5th Cir. 1977) 6
United States v. Schmalfeldt, 657 F. Supp. 385 (W.D. Mich. 1987) 6
United States v. Williams, 504 U.S. 36 (1992) .. 25
Wheat v. United States, 486 U.S. 153 (1988) ... 22

MISCELLANEOUS

Administrative Office of the United States Courts, "Caseload Statistics 2012: Table D-4 Defendants Disposed of, by Type of Disposition and Offense" 13

American Bar Association, The Federalization of Criminal Law: Defending Liberty, Pursuing Justice (1998) 9, 10, 12
John S. Baker, "Revisiting the Explosive Growth of Federal Crimes," Heritage Foundation Legal Memorandum (June 16, 2008) 11
Sara Sun Beale, "Federalizing Crime: Assessing the Impact on the Federal Courts," 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39 (1996) . 9
G. Carey & J. McClellan, The Federalist, Center for Judicial Studies (1990) 8, 36
Clay S. Conrad, Jury Nullification: The Evolution of a Doctrine, Carolina Academic Press (1998) 31
Congressional Research Service, Crime and Forfeiture (May 13, 2013) 7, 35
Department of Justice, Assets Forfeiture Fund and Seized Asset Deposit Fund, Annual Financial Statements, Fiscal Year 2012 (Jan. 2013) 34
Department of Justice, Federal Grand Jury Practice (Oct. 2008) 19
Federal Rules of Criminal Procedure, Rule 6 ... 25
The Federalist Society, the OverCrim Debate ... 11
G. Fields & J. Emshwiller, "Federal Guilty Pleas Soar As Bargains Trump Trials," *Wall Street Journal*, Sept. 23, 2012 14
Michael O. Finkelstein, "A Statistical Analysis of Guilty Plea Practices in the Federal Courts," 89 HARVARD L. REV. 314 (Dec. 1975) 14, 16
Gregory Fouts, "Reading the Jurors their Rights: The Continuing Question of Grand Jury Independence," 79 IND. L.J. 323 (Winter 2004) 26

M. Friedman, Capitalism and Freedom (Univ. of Chicago Press: 2009) 38
Press Release, House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization, May 5, 2013 12
Attorney General Robert Jackson, Speech to U.S. Attorneys (Apr. 1, 1940) 37
Niki Kuckes, "Retelling Grand Jury History," Grand Jury 2.0: Modern Perspectives on the Grand Jury, Carolina Academic Press (2011) 27, 28
H. Levintova, J. Lee, and B. Brownell, "Why You're in Deep Trouble If You Can't Afford a Lawyer," *Mother Jones* (May 6, 2013) 15, 22
Bill Moushey, "When Safeguards Fail," *Post-Gazette* (Dec. 6, 1998) 28
J. Shellenberger & J. Strazzella, "The Lesser Included Offense Doctrine and the Constitution," 79 MARQUETTE L. REV. 3 (Spring 1996) 15
Rep. Steve Stockman, "Gun Free Zones Kill," The Blaze (Apr. 30, 2013) 12
U.S. Attorney's Manual 26
Brian W. Walsh, "Doing Violence to the Law: The Over-Federalization of Crime" (June 9, 2011) 11
Karl Wittfogel, Oriental Despotism: A Comparative Study of Total Power, Vintage Books (1981) .. 5

INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners Foundation, U.S. Justice Foundation, Downsize DC Foundation, Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"), and are public charities. Gun Owners of America, Inc., DownsizeDC.org, and Abraham Lincoln Foundation are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, including the defense of the rights of crime victims, the rights to own and use firearms, and related issues. Each organization has filed many *amicus curiae* briefs in this and other courts.

---

[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Congress does not require, and the procedure sanctioned by the Court of Appeals below now precludes, any meaningful judicial review of Department of Justice applications for asset seizures after indictment and before trial. As carefully documented by Petitioner (Pet. Br., pp. 6-29), the Department of Justice has access to, and knows how to employ, a myriad of prosecutorial powers to pressure a defendant to plead guilty, even where the merits of its case are weak, at best. Now, the Department of Justice demands even greater power over a federal defendant, by seizing his assets without a hearing, which often deprives him of his Sixth Amendment right to engage counsel of choice, and thus to mobilize a meaningful defense to the charges against him.

Until 1970, statutory criminal asset forfeiture was unknown in the federal system. Then Congress granted the Department of Justice broad powers exclusively to deal with the threats of organized crime and drug trafficking. Over time, Congress extended these same powers to be used against broad classes of criminal defendants. This same period has seen an explosion of federal crimes, almost none of which were envisioned by the Founders. Repeatedly, Congress has responded politically to the daily headlines with proposals to create new crimes, or increase the penalties for existing crimes. Recently, however, even some in Congress have realized that the dangers of the path it is on, as the House Judiciary Committee has created a Bipartisan Task Force on Over-Criminalization. Until unconstitutional laws can be

repealed and draconian penalties and powers be denied to prosecutors, defendants will regularly enter guilty pleas to avoid an even worse outcome for those who insist on the constitutional right to a jury trial.

The court of appeals insists that a defendant is protected from asset seizure by the statutory requirement of a grand jury indictment, citing Supreme Court opinions reflecting the protective role that the grand jury was originally designed to serve. Inconsistently, the court of appeals catalogues how, over the past 60 years, the constitutional right to a grand jury indictment has eroded so that it no longer serves the protective role envisioned by the Fifth Amendment. The quantum and quality of evidence required to return an indictment is so low that the grand jury has become the virtual tool of government prosecutors who can obtain at will nearly any indictment that they seek, including one containing an asset forfeiture count. Furthermore, the official grand jury charge instructs the jurors that the law is determined exclusively by Congress, binding them by oath or affirmation to return an indictment even if the grand jury believes the statute is unconstitutional.

Under the procedure sanctioned by the court of appeals, asset seizure will occur almost automatically at the request of Department of Justice attorneys. Yet, under current law, the Department of Justice is a primary beneficiary of funds forfeited. Vesting such discretionary power in attorneys in the employ of the Department of Justice violates the due process principle of impartiality articulated in the case of Tumey v. Ohio.

ARGUMENT

I. THE COURT OF APPEALS' PRECLUSION OF A MEANINGFUL RIGHT TO CHALLENGE ASSET SEIZURES IMBALANCES THE FEDERAL CRIMINAL JUSTICE SYSTEM, IMPAIRS A DEFENDANT'S RIGHT TO COUNSEL OF CHOICE, AND VIOLATES DUE PROCESS OF LAW.

Petitioners' Brief details a truly remarkable story of prosecutorial pursuit of convictions at all costs, including bringing fraud cases with no victim (Pet. Br., p. 21), and employing a novel legal theory of constructive trust as a substitute for nonexistent evidence (*id.* at 21-22). The prosecutors well know the power of asset seizure,[2] demonstrating below how a grand jury can be led to issue a superseding indictment to add a new charge to an indictment — conspiracy to commit money laundering without any evidence of concealment of the origin of the funds — simply to facilitate the seizure of additional assets which could not be traced to the crimes originally charged. *Id.*, pp. 14-15.

With this display of raw federal prosecutorial power on display, it becomes important to place the asset forfeiture power into the context of the modern

---

[2] The federal government's power to seize a defendant's property before trial is variously called a "protective order," "a restraining order," "a temporary restraining order," and "an injunction" in 21 U.S.C. § 853(e). The term "seizure" is used herein.

federal criminal justice system. Until relatively recently, asset forfeiture was never considered to be a legitimate power of the federal government. Indeed, until well into the twentieth century, the federal government was never intended to have a major role in enforcing criminal law. These departures from the vision of the Founders have a perverse effect on the relationship between the federal government and its citizens.

A. Asset Forfeiture Was Disfavored by the Founders.

Criminal asset forfeiture is a relatively new power within the federal law.[3] It has some predicate in early English common and statutory law, as Justice William J. Brennan succinctly summarized:

> At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a **deodand**.... Forfeiture also resulted at common law from **conviction for felonies and treason**.... In addition, English Law provided for statutory forfeitures of offending objects used in violation of the **customs and revenue laws**.... [Calero-Toledo v. Pearson Yacht Leasing, 416 U.S. 663, 680-82 (1974) (emphasis added, footnotes omitted).]

---

[3] Some of the early origins of the asset forfeiture are discussed in Karl Wittfogel, Oriental Despotism: A Comparative Study of Total Power, Vintage Books (1981), pp. 72-78.

In the United States, however, Justice Brennan explained that, except for *in rem* "forfeiture of commodities and vessels used in violations of customs and revenue laws" (*id.* at 683), criminal forfeiture was not favored:

> Deodands did not become part of the common-law tradition of this country.... Nor has forfeiture of estates as a consequence of federal criminal conviction been permitted.... Forfeiture of estates resulting from a conviction for treason has been constitutionally proscribed by Art. III, § 3, though forfeitures of estates for the lifetime of a traitor have been sanctioned.... [*Id.* at 682-83 (footnotes omitted).]

The first Congress prohibited "forfeiture of estate" for violation of any federal crime (Act of April 30, 1790, Sec. 24, 1 Stat. 112, 117), a statute that remained in effect (at least in part) until 1984, when it was repealed by the Comprehensive Forfeiture Act (Pub. L. 98-473). Until 1970, there was no federal criminal asset forfeiture of any sort. *See, e.g.*, United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977) ("Indeed, the forfeiture of a portion of an individual's property as a consequence of a criminal conviction was unknown to the federal criminal law until the passage of [18 U.S.C.] § 1963. Such a penal foray bespeaks a need for circumspection.").[4]

---

[4] *Cf.* United States v. Schmalfeldt, 657 F. Supp. 385 (W.D. Mich. 1987) ("The only exception was the Confiscation Act passed by the Radical Republican Congress in 1862 which authorized President

Broad new criminal powers enacted in 1970 changed the course of federal criminal asset forfeiture. That year brought with it the Racketeer Influenced and Corrupt Organization's Act ("RICO"), section 901(a) of the Organized Crime Control Act of 1970, Pub. L. 91-452, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513. Both included powers of criminal asset forfeiture, but neither contained a power of pre-conviction seizure of assets which would be subject to forfeiture upon conviction.

Not until 1984 did amendments to these laws statutorily authorize *ex parte*, pretrial seizure of assets. *See* 18 U.S.C. § 1963(d); 21 U.S.C. § 853(e). Then, as part of the Civil Asset Forfeiture Reform Act of 2000, Congress extended criminal asset seizure and forfeiture to any criminal case where a civil or criminal forfeiture otherwise would be authorized. *See* 28 U.S.C. § 2461(c). This expansion of authority has resulted in a dramatic increase in criminal forfeiture judgments, which already had eclipsed civil forfeiture judgments in every year since 1995. *See* CRS, Crime and Forfeiture, p. 14 n.78.

Lincoln to forfeit the property of Confederate sympathizers. While the President doubted its constitutionality, the statute was ultimately upheld by the Supreme Court, not on the basis that criminal forfeitures were generally constitutional, but rather because the statute had been passed by virtue of Congress's War Powers." *Id.* at 387 (citations omitted).).

B. The Founders Never Intended the Federal Government to Have a Major Role in Criminal Justice Enforcement.

The U.S. Constitution provides direct authority for Congress to enact only a handful of federal crimes: "counterfeiting" (Art. I, Sec. 8, Cl. 6), "Piracies and Felonies committed on the high Seas, and offenses against the Law of Nations" (Art. I, Sec. 8, Cl. 10), crimes in the federal "District" (Art. I, Sec. 8, Cl. 17), and "treason" (Art. II, Sec. 4; Art. III, Sec. 3, Cl. 1). Reliance on the "necessary and proper clause" (Art. I, Sec. 8, Cl. 18) could support the creation of a limited number of categories of additional federal crimes, such as failure to pay federal taxes (Art. I, Sec. 8, Cl. 1) and postal crimes (Art. I, Sec. 8, Cl. 7).

Alexander Hamilton rejected the notion that the federal government might become "too powerful" usurping the role of the states because "one transcendent advantage belonging to the province of the State governments [is] the ordinary administration of criminal and civil justice." Federalist No. 17, G. Carey & J. McClellan, The Federalist, Center for Judicial Studies (1990), pp. 84-85. Similarly, James Madison explained that "[t]he powers reserved to the several States will extend to all the objects, which ... concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." Federalist No. 45, *supra*, p. 238.

One study demonstrated that founding-era offenses generally:

> dealt with injury to or interference with the federal government or its programs. The federal offenses of the time included treason, bribery of federal officials, perjury in federal court, theft of government property, and revenue fraud...." [Sara Sun Beale, "Federalizing Crime: Assessing the Impact on the Federal Courts," 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996).]

Congress was faithful to the Founders' vision of state enforcement of criminal law for many generations.

> For years following the adoption of the Constitution in 1789, the states defined and prosecuted nearly all criminal conduct. The federal government confined its prosecutions to less than a score of offenses. [American Bar Association, The Federalization of Criminal Law: Defending Liberty, Pursuing Justice (1998), p. 5.]

Until the Presidential Election of 1928, "[c]rime was seen as a uniquely local concern and the power to prosecute rested almost exclusively in the states whose law enforcement activities covered nearly all the activity believed worthy of criminal sanction." The Federalization of Criminal Law, *supra*, p. 6.

C. Congress Has Not Remained Faithful to Original Parameters of the Federal Criminal Justice System.

In contrast with this initial limited vision, federal criminal law has exploded to the point where it has become difficult to quantify and evaluate. So significant has this change been, that the American Bar Association ("ABA") assembled a Task Force on Federalization of Criminal Law, chaired by former Attorney General Edwin Meese III, which issued its report in 1998. American Bar Association, The Federalization of Criminal Law (1998). Based on its study, the Task Force concluded:

> So large is the present body of federal criminal law that there is no conveniently accessible, complete list of crimes. Criminal sanctions are dispersed in places other than the statutory codes (for example, rules of court) and therefore cannot be located simply by reading statutes. A large number of sanctions are dispersed throughout the thousands of administrative "regulations" promulgated by various governmental agencies under Congressional statutory authorization. Nearly 10,000 regulations mention some sort of sanction, many clearly criminal in nature, while many others are designated "civil." [The Federalization of Criminal Law, pp. 9-10 (footnotes omitted).]

Since publication of the ABA study, a ramping up of interest in and scholarship on this topic has occurred.

See, e.g., John S. Baker, "Revisiting the Explosive Growth of Federal Crimes," Heritage Foundation Legal Memorandum (June 16, 2008)[5]; Brian W. Walsh, "Doing Violence to the Law: The Over-Federalization of Crime" (June 9, 2011)[6]; The Federalist Society, the OverCrim Debate.[7]

Just weeks ago, on May 5, 2013, the House Committee on the Judiciary created a Bipartisan Task Force on Over-Criminalization designed "to assess our current federal criminal statutes and make recommendations for improvements."[8] The Committee's release observed that:

> there are an estimated 4,500 federal crimes in the U.S. Code, many of which address conduct also regulated by the states. [T]he number of federal criminal offenses increased by 30 percent between 1980 and 2004. There were 452 new federal criminal offenses enacted

---

[5] http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes.

[6] http://www.heritage.org/research/commentary/2011/06/doing-violence-to-the-law-the-over-federalization-of-crime.

[7] http://www.theovercrimdebate.com/.

[8] The House Judiciary Task Force has already held its first hearing and received testimony. *See, e.g.*, John G. Malcom, "Defining the Problem and Scope of Over-Criminalization and Over-Federalization" testimony before the Committee on the Judiciary (June 14, 2013). http://www.heritage.org/ research/ testimony/2013/06/defining-the-problem-and-scope-of-overcriminalization-and-overfederalization.

> between 2000 and 2007, averaging 56.5 new crimes per year. Over the past three decades, Congress has been averaging 500 new crimes per decade.[9]

Politics, not policy, is the prime driver of the proliferation of crimes. "Highly publicized criminal incidents are frequently accompanied by calls for proposed Congressional responses...." Federalization of Criminal Law, at 11. Most recently, in response to the Sandy Hook Elementary School shootings, and the alleged resulting public outcry, there were no fewer than two dozen gun control bills introduced in Congress.[10] The report continued that "a major reason for the federalization trend — even when federal prosecution of these crimes may not be necessary or effective[11] — is that federal crime legislation is politically popular ... 'not because of any structural incapacity to deal with the problem on the part of state and local government.'" *Id.* at 15. As a result, "[n]ew crimes are often enacted in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need." *Id.* at 14.

---

[9] *See* Press Release, House Judiciary Committee Creates Bipartisan Task Force on Over-Criminalization, May 5, 2013, http://judiciary.house.gov/news/2013/05082013.html.

[10] http://godfatherpolitics.com/9575/tracking-current-federal-gun-control-legislation/.

[11] *See* Rep. Steve Stockman, "Gun Free Zones Kill," The Blaze (Apr. 30, 2013), http://www.theblaze.com/contributions/applying-the-lessons-of-lubys-to-sandy-hook/.

Not only are there more federal crimes than ever before, but they often carry more severe, enhanced sentences than do their state counterparts. "Mandatory minimums" are viewed as providing "harsh, automatic prison terms for those convicted of certain federal ... crimes."[12] For example, 18 U.S.C. § 924(c)(5) provides that "any person who, during and in relation to any ... in furtherance of any ... drug trafficking ... crime ... carries armor piercing ammunition [shall] be sentenced [additionally] to a term of imprisonment of not less than 15 years...."

D. The Modern Federal Criminal Justice System Operates Oppressively against the People of the United States.

In the last reported one-year period (ending March 2012), there were 100,660 criminal defendants whose cases were "disposed of" in the federal system.[13] Of those, 8,693, or only 8.6 percent, were "Not Convicted," while 91.4 percent were "Convicted and Sentenced." *Id.* But of those who were convicted and sentenced, an amazing 89,748 — or 97.6 percent of total "convictions" — were concluded by a plea of guilty. *Id.* The percentage of convictions through guilty pleas had

---

[12] http://www.famm.org/aboutsentencing/WhatAreMandatoryMinimums.aspx

[13] Administrative Office of the United States Courts, "Caseload Statistics 2012: Table D-4 Defendants Disposed of, by Type of Disposition and Offense," http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/D04Mar12.pdf.

been 94.5 percent in 2001,[14] 92.3 percent in 1997,[15] and 84 percent in 1990.[16] In 1974, the percentage of resolutions through convictions was 60.5 percent, but just 33.7 percent in 1908. Michael O. Finkelstein, "A Statistical Analysis of Guilty Plea Practices in the Federal Courts," 89 HARVARD L. REV. 314 (Dec. 1975).

The only protection that the overwhelming number of defendants — whose case is never heard by a petit jury — have against unjust prosecution is that provided by the grand jury, but the grand jury no longer serves any meaningful protective purpose. *See* Section II, *infra*.

While there may be several reasons for the remarkable increase in guilty pleas, it is widely recognized that "[i]n most cases it is pressure — the promise of leniency in sentencing, a reduced charge, or the desire to avoid pretrial detention — that induces guilty pleas." Finkelstein, *supra*, p. 293. Additionally, prosecutors often over-charge crimes that they know they could never hope to prove beyond a reasonable doubt, so that they can retain bargaining power to

---

[14] http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2001/jun01/d04jun01.pdf.

[15] http://catalog.hathitrust.org/Record/003435589.

[16] G. Fields & J. Emshwiller, "Federal Guilty Pleas Soar As Bargains Trump Trials," *Wall Street Journal*, Sept. 23, 2012, http://online.wsj.com/article/SB10000872396390443589304577637610097206808.html.

accept guilty pleas for lower offenses.[17] *See, e.g., id.* at 294. Indeed, guilty pleas can "secure convictions that could not otherwise be obtained." *Id.* at 309. Prosecutors also "stack" charges for the same set of conduct, a practice which has been condoned by this Court, so long as each crime requires proof of an additional element that another does not.[18]

Public defenders on both state and federal levels are badly overworked, and it is "no wonder that many [public defenders can fall] into a 'meet 'em and plead 'em' routine...."[19] Of course, it does not help that the

---

[17] Overcharging is no problem for federal prosecutors when it comes to a trial, since juries are permitted to find defendants guilty of so-called "lesser included offenses," despite that practice's questionable constitutionality. *See, e.g.*, J. Shellenberger & J. Strazzella, "The Lesser Included Offense Doctrine and the Constitution," 79 MARQUETTE L. REV. 3 (Spring 1996). Indeed, this Court required states to permit juries to find lesser included offenses, recognizing that this "rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged," but believing that its operation "can also be beneficial to the defendant...." Beck v. Alabama, 447 U.S. 625, 633-34 (1980).

[18] *See* Blockburger v. United States, 284 U.S. 299, 304 (1932) ("Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

[19] H. Levintova, J. Lee, and B. Brownell, "Why You're in Deep Trouble If You Can't Afford a Lawyer," *Mother Jones* (May 6, 2013). http://www.motherjones.com/politics/2013/05/public-

prosecution's budget invariably exceeds that of the defense by several orders of magnitude. *Id.* Actual guilt, however, does not correlate directly with guilty pleas, even though the judicial system generally assumes "that defendants who were convicted on the basis of a negotiated pleas of guilt would have been convicted had they elected to stand trial." Finkelstein, p. 293.

With not enough federal prosecutorial and judicial resources to try these cases, the entire system discussed above, including the asset seizure power, operates to reduce to a bare minimum the number of cases that actually go to trial. It is into this setting that the court of appeals yielded to the Department of Justice's demands for even greater power over defendants, and an even further tilt of the playing field, as even more defendants are stripped of the means to effectively defend themselves against federal prosecutors.

II. A GRAND JURY INDICTMENT IS NOT AN ACCEPTABLE SUBSTITUTE FOR A POST-INDICTMENT, PRETRIAL HEARING, PRIOR TO SEIZURE OF DEFENDANTS' ASSETS.

The case below has come to the court of appeals below on two occasions. In United States v. Kaley, 579 F.3d 1246 (11th Cir. 2009) ("Kaley I"), the court of appeals reversed the district court's order, which concluded the Kaleys were not entitled to a pretrial

---

defenders-gideon-supreme-court-charts.

evidentiary hearing on their motion to vacate the restraining order freezing their property, and remanded the case for further proceedings. Upon remand, the district court determined that, although the Kaleys were entitled to a pretrial, post-restraint hearing, the only question to be addressed at such a hearing was whether the restrained assets were traceable to or involved in the conduct charged in the indictment. The Kaleys, who had sought to challenge the legal and factual sufficiency of the indictment at that hearing, again appealed.

Then, in the second opinion now before this court United States v. Kaley, 677 F.3d 1316 (2012) ("Kaley II"), the court of appeals affirmed the district court's order denying the Kaleys' right to a post-indictment, post-restraint hearing on the validity of the indictment as a predicate for the district court's *ex parte*, pre-trial order seizing the Kaley's assets.[20] In support, the court relied, in part, upon the supposed protective shield of the grand jury:

> Underlying all of these cases is the Supreme Court's recognition of the unique

---

[20] The issue presented in this case involves indicted defendant's right to a hearing to vacate an *ex parte* restraining order after it is entered. Accordingly, the issue presented by the Petitioners focuses on the need for a post indictment, "pretrial, adversarial hearing at which the defendant may challenge the evidentiary support and legal theory of the underlying charges." Pet. Cert., p. ii. However, should this Court determine that such a hearing is required, that hearing should occur prior to the issuance of a restraining order, unless it were demonstrated that a defendant was in the process of concealing or dissipating his assets.

> nature of the grand jury as an **independent** body, not an arm of the prosecution. See, e.g., Calandra, 414 U.S. at 343 (noting the grand jury's responsibility to **protect citizens** against "arbitrary and oppressive governmental action" in the form of "unfounded criminal prosecutions"); Costello, 350 U.S. at 362 (summarizing the historical independence of the grand jury).... Indeed, "[t]he very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting **independently** of either prosecuting attorney or judge." Stirone v. United States, 361 U.S. 212, 218, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). [Kaley II, 677 F.3d 1325 (emphasis added).]

The court's reasoning is flawed, evidencing an idealized, and totally unrealistic view of the modern role and function of a federal grand jury.[21]

---

[21] Petitioners' Merits Brief challenges "the government's contention below that a grand jury's finding of 'probable cause' is a sufficient procedural safeguard," for asset forfeiture, but only is able to devote two pages of its brief on this topic, pp. 57-59. This *amicus* brief seeks to amplify on the many reasons why a grand jury's indictment is no substitute for a hearing prior to seizure of an individual's assets, particularly when those assets could be used to provide a robust defense of the accused.

A. A Grand Jury Finding of Probable Cause Is Insufficient to Establish the Predicate for Asset Seizure.

A grand jury indictment alone cannot establish the substantive predicate necessary for an asset seizure because it only requires a finding of "probable cause."[22] The Department of Justice's Federal Grand Jury Practice training manual explains current practice:

> A principal function of the modern federal grand jury is to decide whether to approve ("return") an indictment charging federal felony violations.... To make that decision, the grand jury must determine whether there is **probable cause** (i.e., whether it is **more likely than not) to believe** that a **crime has been committed**, and if the **individual charged** in the indictment committed it. [U.S. Department of Justice, Federal Grand Jury Practice (Oct. 2008), p. 9 (emphasis added).]

Thus defined, the standard of probable cause is identical to the "preponderance of the evidence" standard used by petit juries in civil cases — except that a petit jury in a civil case understands that it is

---

[22] In the video now shown to all federal grand jurors before they enter service, one actor playing a grand juror explains: "But it's not as if we're sending him to prison. We don't have to find beyond reasonable doubt. It's just probable cause." The People's Panel (video, at 28:11), http://www.wawd.uscourts.gov/jurors/peoples-panel.

making a final determination of the matter, apart from an appeal.

For **pre-indictment** seizures under 21 U.S.C. § 853(e)(1)(B), Congress expressly required that "there is a **substantial probability** that the United States will prevail on the issue of forfeiture, and that failure to enter the property will result in" loss of the property. (Emphasis added.) But there is no specific standard established for **post-indictment** seizures under subsection (e)(1)(A) — merely "the filing of an indictment or information ... for which criminal forfeiture may be ordered ... and alleging that the property ... would, in the event of conviction, be subject to forfeiture...." In United States v. Monsanto, 491 U.S. 600 (1989), the Supreme Court made clear that it was not deciding "whether the Due Process Clause requires a hearing before a [post indictment], pretrial restraining order can be imposed," giving rise to a split in the circuits and this Court granting certiorari in this case. *Id.*, at 615; Pet. Cert., pp. 19-20.

In taking the position that a pretrial hearing and a judicial determination of "probable cause to believe the assets are forfeitable" was not required, the court of appeals takes the position that a grand jury indictment, followed by a trial court's approval of the government's *ex parte* application, meets not only the statutory requirement that the assets are forfeitable, but the requirements of the constitutional standard of due process of law. Only if the four factors, enumerated in United States v. Bissell, 866 F.2d 1343 (11th Cir. 1989), are resolved favorably to the defendant would he be allowed to participate in any

hearing, and even then, the hearing is limited to whether the assets fit in one of the section 853(a) categories.[23] According to the court of appeals, in no circumstance would the defendant have the right to a hearing to challenge the merits of the government's case underlying the seizure. Therefore, whether a hearing is granted under Bissell or not, the court of appeals relies on the grand jury indictment to establish the predicate for seizure post indictment.

Congress clearly requires a higher standard of proof for pre-indictment seizures — "substantial probability" — well short of "beyond a reasonable doubt," but provides well more than "probable cause to believe." The question not really addressed by the court of appeals is whether, consistent with the requirements of Fifth Amendment's Due Process Clause, an indictment provides a sufficient predicate for a seizure, particularly where the seizure may deprive a defendant of counsel of his choice under the Sixth Amendment?

The court of appeals gave only lip service to the important constitutional principles involved. With respect to the Sixth Amendment, the court stated:

---

[23] Other than for defendants involved in a "continuing criminal enterprise," for such assets to be forfeitable under 21 U.S.C. § 853, they must be either be: (1) the fruits of the crime ("the property constituting, or derived from, any proceeds ... as a result of such violation" 21 U.S.C. § 853(a)) or (2) the instrumentalities of the crime ("the property used ... to commit ... the commission of such violation..." (*Id.*).)

> We begin by emphasizing again that the Sixth Amendment right implicated here – the qualified **right to counsel of choice** – is a **weighty concern**. A pretrial restraining order may make unavailable assets that a criminal defendant needs to pay for his counsel of choice. As we recognized in Kaley I, this is a **serious consequence** for the defendant. "Being effectively shut out by the state from retaining the counsel of one's choice in a serious criminal case is a substantial source of prejudice...." [Kaley II, 667 F.3d at 1319 (citation omitted).]

Then the court of appeals noted that "[t]he Supreme Court has made clear ... that the right to counsel of choice does not include the right to use illegitimate forfeitable assets to pay for counsel."[24] *Id.*, 667 F.3d at 1319 n.2. (citation omitted). Thereafter, all discussion focused on the question of a right to a hearing. Never did the court consider whether mere probable cause was a sufficiently high standard to curtail the "weighty concern" with "serious consequences" — the Sixth Amendment right to counsel of one's choice.

The court never considered that public defenders are badly overworked,[25] and cannot possibly give the

---

[24] *See* Wheat v. United States, 486 U.S. 153, 157, 164 (1988) (The Sixth Amendment guarantees a defendant counsel of his choice, free of conflicts of interest).

[25] H. Levintova, "Why You're in Deep Trouble if You Can't Afford a Lawyer," *Mother Jones* (May 6, 2013), http://www.mother

type of attention to cases that can private counsel.[26] The fact that a pretrial seizure would make it difficult to present a defense is certainly not a fact unknown to federal prosecutors who, in this case, sought a pretrial seizure the day after the grand jury returned its indictment. In the current system approved by the court of appeals, it is the prosecutors who decide whether to seize a defendant's assets, subject to narrow review and routine approval by district court judges or magistrates. Prosecutors cannot be expected to be neutral in such a matter, and their exercise of discretion must be subject to independent review.

Lastly, even assuming the principle that forfeitable assets should not be used to pay for counsel, this begs the question of by what standard it is determined that the assets should be deemed forfeitable. The court of appeals never explained why a decision reached by a bare majority of 13 of 24 federal grand jurors, based on mere "probable cause to believe," was a sufficient predicate for an asset seizure, especially one implicating the Sixth Amendment right to counsel.

---

jones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts.

[26] The Administrative Office of the U.S. Courts' Office of Defender Services Training Branch does not even appear to have training materials available on asset forfeiture. http://www.fd.org/navigation/select-topics-in-criminal-defense.

B. The Grand Jury's Modern Investigative Role Does Not Protect against Improper Indictments.

The court of appeals premised its decision, that a grand jury indictment is a meaningful substitute for a hearing, on its belief the modern grand jury operates "an **independent** body, not an arm of the **prosecution**." Kaley II, 677 F.3d at 1325. While this once may have been true, it is no longer. The court of appeals somehow embraced platitudes as to grand jury independence while simultaneously enumerating the loss of grand jury protections over the past six decades:

- 1956. Where "the only evidence presented to the grand jury was in the form of **hearsay**" and the indictment was "not supported by competent evidence," the challenge would not be heard. Costello v. United States, 350 U.S. 359, 361 (1956). Kaley II, 677 F.3d at 1324 (emphasis added).

- 1958. "[T]he validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of **inadequate or incompetent evidence**. Lawn v. United States, 355 U.S. 339 (1958)." Kaley II, 677 F.3d at 1324 (emphasis added).

- 1974. "[A]n otherwise valid indictment may not be invalidated even if the grand jury has considered evidence obtained in **violation** of a

defendant's constitutional rights." United States v. Calandra, 414 U.S. 338 (1974). Kaley II, 667 F.3d at 1324 (emphasis added).

- 1988. Even in the case of demonstrated **prosecutorial misconduct**, an indictment **may** be dismissed "only if the defendant can show prejudice." Bank of Nova Scotia v. United States, 487 U.S. 250, 255-56 (1988). Kaley II, 667 F.3d at 1325 (emphasis added).

- 1992. "[A]n indictment cannot be invalidated based on the government's **failure to present** known **[substantial] exculpatory evidence** to the grand jury." United States v. Williams, 504 U.S. 36 (1992). Kaley II, 667 F.3d at 1324-25 (emphasis added).

In addition to the matters cited by the court of appeals, there are many other protections of criminal law which do not apply to federal grand juries.

- Grand juries are conducted by prosecutors *ex parte*. Rule 6(d), Federal Rules of Criminal Procedure.

- Neither witnesses nor targets may be represented by counsel. Rule 6(d)(1), Federal Rules of Criminal Procedure.

- A grand jury is not required to allow a target or subject to testify, even if he requests it. U.S. Attorney's Manual, section 9-11.152.[27]

- The Federal Rules of Evidence do not apply. "[J]urors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge." United States v. Dionisio, 410 U.S. 1, 15 (1973).

- Even prosecutorial misconduct in breaching "traditional secrecy requirements" of the grand jury does not allow a challenge to an indictment. Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989).

As a result of these changes, by a recent study, federal grand juries return indictments on more than 99.6 percent of the cases presented to them.[28] It is beyond question that the decisions of this Court, and other lower federal courts following its lead, have eroded the protections of the grand jury, fundamentally changing its nature from one which was adjudicative and protective to one which is almost purely prosecutorial in nature.

---

[27] http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/11mcrm.htm#9-11.101

[28] Gregory Fouts, "Reading the Jurors their Rights: The Continuing Question of Grand Jury Independence," 79 IND. L.J. 323, 330 (Winter 2004).

> The grand jury from early federal history was, if anything, more judicial than prosecutorial.... [C]ontrary to modern myth, the dominant strand of American grand jury history ... imposed **strict evidentiary limits on grand jury evidence**, and required a **significantly higher standard** for grand jury indictment than do the modern federal courts. [T]hrough the middle of the twentieth century, the grand jury played a role far closer to a trial jury that heard half of the government's evidence than to the modern minimal, accusatory body that the Supreme Court has approved.... [Niki Kuckes, "Retelling Grand Jury History," Grand Jury 2.0: Modern Perspectives on the Grand Jury, Carolina Academic Press (2011), pp. 126-28 (emphasis added).]

To establish her point, Professor Kuckes details that, from Chief Justice Marshall's day to the time of the Costello case in 1956, the grand jury was subject to the rules of evidence. "[T]he grand jury could indict only upon such 'legal evidence' such as would be admissible at trial, and not upon hearsay." *Id.* at 137. Today, a target can be indicted without a shred of evidence which would be admissible at trial.

Further, Professor Kuckes explains that the current "probable cause" standard of proof may even be more recent in origin, replacing a "more stringent *prima facie* test" that had been used at least since the 1830's.

> In 1836 ... Chief Justice Taney instructed a federal grand jury to "present no one, unless, in your deliberate judgment, the evidence before you is sufficient, in the absence of any other proof, to justify the conviction of the party accused" — emphasizing that this rule is "all the more proper" since the grand jury will not hear the evidence in defense." [Kuckes, *supra*, p. 125.]

Professor Kuckes cites a 1947 criminal justice treatise that explains: "In finding an indictment the grand jury is acting like a trial jury, except that it hears but one side of the case." *Id.*, p. 146, n.154. Kuckes concludes, "[t]here is no Supreme Court decision announcing that the standard for indictment shall henceforth be 'probable cause.'" Perhaps the most decisive event, in this regard, was the ... standardized grand jury instructions ... in 1978." *Id.*, p. 146, n.161.

It is no wonder that former Deputy Attorney General Arnold I. Burns (who served under President Reagan), observed that the federal grand jury "is no longer a protection of the person who is suspected of crime, it is a vicious tool...."[29] Rather than serving the purpose indented by the founders, "[t]he grand jury process today is as far afield from it was intended to be as it could possibly be." *Id.*

---

[29] Quoted in Bill Moushey, "When Safeguards Fail," *Post-Gazette* (Dec. 6, 1998), http://old.post-gazette.com/win/day7_1a.asp, whose 10-part series catalogs misconduct of federal law enforcement officials in the pursuit of convictions.

Based on the many changes to the early American grand jury model, the understanding expressed by the court of appeals that the grand jury protects defendants from improper indictments, might possibly have been previously accurate, but presently, fanciful:

> In Williams, the Court explained that the grand jury "belongs to no branch of the institutional Government, serving as a kind of **buffer or referee** between the Government and the people." Williams, 504 U.S. at 47. As the Court had previously explained, the grand jury "serves the invaluable function in our society of **standing between the accuser and the accused** ... to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." Branzburg v. Hayes, 408 U.S. 665, 687 n.23 (1972) (alteration in original) [citations omitted.] [Kaley II, 677 F.3d at 1325 (emphasis added).]

Having been stripped of its essential character, the modern federal grand jury cannot be trusted to protect individuals against ill founded indictments, as had been originally intended, and certainly cannot be relied upon to provide a meaningful "due process" protection for individuals from the pre-trial seizure of their property.

C. The Grand Jury Does Not Protect the Kaleys from Unconstitutional Acts of Congress.

The court of appeals assumes a grand jury protects "citizens against 'arbitrary and oppressive government action' in the form of 'unfounded criminal prosecutions.'" Kaley II, 677 F.3d at 1325 (citations omitted). Yet a grand jury provides no protection whatsoever against an indictment for violation of an unconstitutional law. Indeed, today grand jurors are charged that in considering an indictment: "You cannot judge the wisdom of the criminal laws enacted by Congress, that is, whether or not there should or should not be a federal law designating certain activity as criminal. That is to be determined by Congress and not by you."[30]

This modern approach differs from the understanding at the founding of the country, when a defendant could urge a petit jury to acquit if they believed the law with which he was charged was unconstitutional. Chief Justice John Jay advised a petit jury that "[i]t is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that court are [sic] the best judges of law. But still both objects are lawfully, within your power of decision ... you have a right to take it upon yourselves to judge of both, and to determine the law

---

[30] Model Grand Jury Charge (Approved by the Judicial Conference of the United States, March 2005), ¶ 9. http://www.uscourts.gov/FederalCourts/JuryService/ModelGrandJuryCharge.aspx.

as well as the fact in controversy." Georgia v. Brailsford, 3 U.S. 1, 4 (1794).

In 1895, the power of a petit jury to judge the law was eroded when the Supreme Court ruled that federal judges were not required to inform those jurors of their inherent authority to judge the law in a case. Sparf v. United States, 156 U.S. 51 (1895). *See* Clay S. Conrad, Jury Nullification: The Evolution of a Doctrine, Carolina Academic Press (1998), pp. 99-108. Today, the role of a petit juror is largely eviscerated, as district court judges claim for themselves the exclusive power to judge the law, seizing that power away from the petit jury. It is now standard practice to admonish petit jury against considering the constitutionality or merit of the law.[31]

A grand juror who operates consistent with the Model Charge provides no protection against "oppressive government," as expressed by the court of appeals. Moreover, under the procedure approved by the court of appeals for asset seizures, the only individual now thought to be invested with the ability to protect a defendant from an unconstitutional law — a district court judge — could very well be precluded from even considering the matter.

---

[31] *See, e.g.*, Eleventh Circuit Pattern Jury Instructions (Criminal Cases) 2003, Preliminary Instructions, p. 1 ("You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.") http://federalcriminaljuryinstructions.com/uploads/11th_Circuit_Jury_Instructions_PDF.pdf.

A district judge would be constrained to order a seizure, even if he believes the underlying criminal statute to be unconstitutional. And, if seizure of assets precludes a defendant from retaining his counsel of choice to mount a vigorous constitutional challenge to a criminal law, that district judge might never have the issue of the constitutionality of the law presented to him. Similarly, if the deprivation of counsel of choice leads to a plea bargain influenced by the asset forfeiture, a defendant could be sentenced for violation of an unconstitutional law.

D. The Rule that a Defendant May Not Challenge a Grand Jury Indictment Is Not in Jeopardy.

The court of appeals stated that a "pretrial challenge to the evidence supporting an indictment would be wholly inconsistent with the Supreme Court's repeated pronouncements in Costello v. United States, 350 U.S. 359 (1956) and its progeny." Kaley II, 677 F.3d at 1323. Costello addressed a challenge to a grand jury indictment as being based exclusively on hearsay evidence, seeking to avoid a trial before a petit jury — a very different circumstance from that presented here. There, the Court correctly observed that, if the government's theory were to prevail, "a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury [which is] not required by the Fifth Amendment." *Id.*, 350 U.S. at 363.

The rule that a grand jury indictment could not be challenged for lack of evidence relates only to trial and

has no bearing on unrelated purposes such as the seizure of a defendant's assets, and the related loss of the right to retain counsel of choice. A prosecutor has it within his power to preclude a challenge to a grand jury indictment — by foregoing a pretrial seizure of the defendant's assets. *See* Kaley II, pp. 1331 (Judge Edmondson, concurring) ("The government takes this inconvenience upon itself by making its own choice about how it will proceed....").

III. ASSET SEIZURE AT THE DISCRETION OF THE DEPARTMENT OF JUSTICE IS INCONSISTENT WITH THE RULE OF TUMEY V. OHIO.

According to the regime sanctioned by the court of appeals, pretrial seizure of a criminal defendant's assets is based solely on (i) an indictment obtained from a grand jury, which operates under the effective direction and control of the U.S. Department of Justice,[32] followed by (ii) an *ex parte* application by the Department of Justice to a federal district court. Under that system, a defendant has no right to be heard with respect to the merits of the government's charges against him either before the grand jury or the district court. Indeed, the court below would allow a defendant only a limited post-seizure right to be heard, and even then, the defendant would have the burden of showing that the property seized is not the fruit or instrumentality of the alleged criminal activity. Pet. Br., p. 24. In such a system, it is neither the grand

---

[32] *See* Pet. Br., p. 56.

jury nor the district court that determines the lawfulness of the seizure; rather, it is a matter within the control of the Department of Justice.

Vesting discretionary power to seize assets in the Department of Justice threatens a defendant's ability to afford to engage counsel of his choice, unfairly making the prosecution less difficult, and a plea bargain more likely. And petitioners identify a further reason why the Department of Justice cannot be entrusted with this power — under current asset forfeiture law, "'the Government has a direct pecuniary interest in the outcome of the proceeding.'" Pet. Br., p. 56 (citing United States v. James Daniel Good Real Property, 510 U.S. 43, 55-56 (1993)). Petitioners' argument is reinforced by this Court's ruling in Tumey v. Ohio, 273 U.S. 510 (1927).

At the beginning of federal asset forfeiture in 1970, monies received from forfeitures were deposited into the general fund of the United States Treasury and were expended by Congress through the appropriations process. This was changed by the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, which created several new forfeiture funds. The two primary funds are the Department of Justice Asset Forfeiture Fund ("DOJ Fund") and the Department of the Treasury Forfeiture Fund. The DOJ fund held assets totaling $5.97 billion as of September 30, 2012.[33] These two funds are expected to receive over $2 billion

---

[33] Department of Justice, Assets Forfeiture Fund and Seized Asset Deposit Fund, Annual Financial Statements, Fiscal Year 2012 (Jan. 2013), p. 25.

more in fiscal year 2014. *See* Congressional Research Service, "Crime and Forfeiture," No. 97-139, p. 21 (May 13, 2013).[34]

The DOJ Fund is directed by statute to pay certain categories of expenses, including: forfeiture related expenses; rewards to informants; liens and mortgages against forfeited property; remission and mitigation in forfeiture cases; equipping vehicles for law enforcement use; purchasing evidence of other crimes; paying state and local taxes on forfeited property; and overtime, travel, and training for state and local law enforcement who assist the federal government. 28 U.S.C. § 524(c). *See* CRS, "Crime and Forfeiture," pp. 22-23. Once these types of expenses are paid, DOJ has been given complete discretion to expend the surplus in the DOJ Fund "for any Federal law enforcement, litigative/prosecutive, and correctional activities, or any other authorized purpose of the Department of Justice." 28 U.S.C. § 524(c)(8)(E).

Although this Court has not had occasion to consider the consequences and possible corrupting effect of the Department of Justice's clear self-interest in assets forfeited, it has previously ruled on the principle involved. In Tumey v. Ohio, 273 U.S. 510 (1927), the Court addressed a state statute which empowered a village mayor to function as a judge with respect to minor offenses, including determining guilt and the amount of the fine. Some of the fines

---

[34] http://www.fas.org/sgp/crs/misc/97-139.pdf.

generated were paid to the mayor personally, and some to the village over which he presided. Tumey is generally cited for the proposition that due process requires an impartial judge without a personal pecuniary interest in the outcome, [34] but the Court's concerns extended equally to the corrupting effect of the benefit flowing to the village. The Court posed the question, "With his interest, as mayor, in **the financial condition of the village**, and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trail or a fair sentence from one who would have so strong a **motive to help his village** by conviction and a heavy fine?" Tumey at 533 (emphasis added). The Court found that the question answered itself, viewing the judge's interest in the financial prosperity of his employer, the village, was just as problematic as the judge's personal self-interest. Thus, the judge was disqualified both "because of his direct pecuniary interest in the outcome, and because of his official **motive** to convict and to graduate the fine **to help the financial needs of the village**." *Id.* at 535 (emphasis added).

For the same reason that the mayor was disqualified from ruling on guilt or innocence and imposing a fine in a traffic case, Department of Justice lawyers cannot be entrusted with broad authority to

---

[34] *See Jeremiah* 1:53 ("Neither can they judge their own cause, nor redress a wrong, being unable...."); Federalist No. 10 ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."); 28 U.S.C. § 455.

trigger the seizure of assets which become the *de facto* property of their direct employer. These are matters to which the Department of Justice should be sensitive, but has not been. Then-Attorney General, Justice Robert Jackson, on the day he addressed U.S. Attorneys in the Great Hall of the U.S. Department of Justice on April 1, 1940, addressed the role of the federal prosecutor, giving these cautions:

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous.... The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial.... A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.[35]

The extent of prosecutorial power which troubled Justice Jackson in 1940 has been vastly increased since then, and the court of appeals has now approved yet another exponential increase in the prosecutor's powers over the people. This case demonstrates, once again that Justice Jackson's call for prosecutorial fair

---

[35] http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/the-federal-prosecutor/

play and humility has proven inadequate to constrain the government's quest for additional power. A system which invests the federal prosecutor with vast powers to do good is always accompanied by a concomitant power to do great evil.[36] Justice would be far better served if the powers of federal prosecutors were carefully defined and strictly limited.

Nothing short of a full consideration of the merits of the government's case by a district court judge, even after indictment, will satisfy the requirements of due process, prior to the exercise of the draconian power to seize the assets of a federal defendant.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street, Ste. 2
Ramona, CA 92065
(760) 788-6624

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
ROBERT J. OLSON
HERBERT W. TITUS
JOHN S. MILES
WILLIAM J. OLSON, P.C.

---

[36] "The power to do good is also the power to do harm; those who control the power today may not tomorrow; and, more important, what one man regards as good, another may regard as harm." M. Friedman, Capitalism and Freedom (Univ. of Chicago Press: 2009), p. 3.

Attorney for U.S. Justice Foundation

370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

**Counsel of Record*
July 8, 2013

AMICUS CURIAE BRIEF

No. 12-464

In The Supreme Court of the United States

KERI L. KALEY and BRIAN P. KALEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
SCOTT G. BULLOCK
DARPANA M. SHETH*
901 North Glebe Road,
Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
E-mail: wmellor@ij.org,
sbullock@ij.org,
dsheth@ij.org

Counsel for Amicus Curiae

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. The Pretrial Restraint of Assets Is a "Nuclear Weapon" of Prosecutors, Requiring Strong Procedural Safeguards To Prevent Unjustified Deprivations of Property 6

II. The Heart of Due Process Is an Opportunity To Be Heard at a Meaningful Time and in a Meaningful Manner 13

A. *Mathews* Provides the Proper Framework To Determine What Constitutes a Sufficient Opportunity To Be Heard Under the Due Process Clause 15

B. By Wrongly Applying *Barker v. Wingo*'s Speedy-Trial Test, the Eleventh Circuit Incorrectly Limited Both When a Pretrial Evidentiary Hearing Is Required and the Scope of That Hearing 18

III. Applying *Mathews* Requires a Pretrial Evidentiary Hearing at Which the Owner Can Contest the Validity of the Restraint 23

A. The Individual's Right to Property and the Irreparable Injury That Can Result from Deprivation Until Trial Necessitate a Pretrial Evidentiary Hearing 25

TABLE OF CONTENTS – Continued

Page

1. The Right to Property, in Itself, Is Entitled to Great Weight 26

2. Because the Interim Deprivation of Property Causes Irreparable Injury, Due Process Requires a Pretrial Evidentiary Hearing 29

B. The Profit Incentive Facing Law Enforcement Creates a High Risk of Erroneous Deprivation, Which Can Only Be Mitigated By a Pretrial Evidentiary Hearing 33

C. The Government's Interest in Avoiding a Pretrial Evidentiary Hearing Is Minimal 37

CONCLUSION 41

TABLE OF AUTHORITIES

Page

CASES

Addington v. Texas, 441 U.S. 418 (1979) 16

Ake v. Oklahoma, 470 U.S. 68 (1985) 17

Alvarez v. Smith, 558 U.S. 87 (2009) 1, 23

Armstrong v. Manzo, 380 U.S. 545 (1965) 14

Barker v. Wingo, 407 U.S. 514 (1972) .....*passim*

Bennis v. Michigan, 516 U.S. 442 (1996).....1

Burns v. United States, 501 U.S. 129 (1991) 17

Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886 (1961).....15

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).....24, 38

Carey v. Piphus, 435 U.S. 247 (1978).....14

City of Los Angeles v. David, 538 U.S. 715 (2003).....21

Comm'r of IRS v. Shapiro, 424 U.S. 614 (1976).....30, 32

Connecticut v. Doehr, 501 U.S. 1 (1991) .....*passim*

Dolan v. City of Tigard, 512 U.S. 374 (1994).....27

Florida v. Harris, 133 S.Ct. 1050 (2013) 1

Fort Wayne Books v. Indiana, 489 U.S. 46 (1989) 26

Fuentes v. Shevin, 407 U.S. 67 (1972).....27, 28

Fusari v. Steinberg, 419 U.S. 379 (1975) 15

Gerstein v. Pugh, 420 U.S. 103 (1975) 39

Gilbert v. Homar, 520 U.S. 924 (1997).....16

TABLE OF AUTHORITIES – Continued

Page

Goldberg v. Kelly, 397 U.S. 254 (1970) 31, 40

Grupo Mexicano de Desarrolo, S.A. v. Alliance Bond Fund, 527 U.S. 308 (1999) 6

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 17

Harmelin v. Michigan, 501 U.S. 957 (1991) 35

Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) 36

Krimstock v. Kelly, 306 F.3d 40 (2d Cir. 2002).....22, 39

Krimstock v. Kelly, 464 F.3d 246 (2d Cir. 2006).....23

Libretti v. United States, 516 U.S. 29 (1995).....9

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 27

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980).....14, 35, 36

Mathews v. Eldridge, 424 U.S. 319 (1976).....*passim*

Medina v. California, 505 U.S. 437 (1992) 14, 18

Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1 (1978) 31, 32

Mitchell v. W.T. Gant Co., 416 U.S. 600 (1974) 28

Morrison v. Olson, 487 U.S. 654 (1988) 8

Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192 (D.C. Cir. 2001) 24

N. Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) 24

Sackett v. Environmental Protection Agency, 132 S.Ct. 1367 (2012) 1

TABLE OF AUTHORITIES – Continued

Page

Santosky v. Kramer, 455 U.S. 745 (1982) 16

Simms v. District of Columbia, 872 F. Supp. 2d 90 (D.D.C. 2012) 12, 22, 39

Smith v. City of Chicago, 524 F.3d 834 (7th Cir. 2008), *vacated as moot, sub nom. Alvarez v. Smith*, 558 U.S. 87 (2009) 22

Tumey v. Ohio, 273 U.S. 510 (1927) 35

Turner v. Rogers, 131 S.Ct. 2507 (2011) 16

United States v. 434 Main St., Civ. A. No. 09-11635-JGD, 2013 WL 308981 (D. Mass. Jan. 24, 2013) 11

United States v. $8,850, 461 U.S. 555 (1983) 19, 20

United States v. Bissell, 866 F.2d 1343 (11th Cir. 1989) 20, 21, 39

United States v. E-Gold, Ltd., 521 F.3d 411 (D.C. Cir. 2008) 18

United States v. Farmer, 274 F.3d 800 (4th Cir. 2001) 18

United States v. Holy Land Found. for Relief & Dev., 493 F.3d 469 (5th Cir. 2007) 17

United States v. James Daniel Good Real Prop., 510 U.S. 43 (1993) ..... *passim*

United States v. Jones, 160 F.3d 641 (10th Cir. 1998) 18, 21, 37

United States v. Kaley (Kaley I), 579 F.3d 1246 (11th Cir. 2009) 10

TABLE OF AUTHORITIES – Continued

Page

United States v. Kaley (*Kaley II*), 677 F.3d 1316 (11th Cir. 2012) 8, 26, 30

United States v. Melrose E. Subdivision, 357 F.3d 493 (5th Cir. 2004) 21

United States v. Michelle's Lounge, 39 F.3d 684 (7th Cir. 1994) 18

United States v. Monsanto, 924 F.2d 1186 (2d Cir. 1991) (*en banc*) 18

United States v. Monsanto, 491 U.S. 600 (1989) 22

United States v. Ninety-Three Firearms, 330 F.3d 414 (6th Cir. 2003) 23

United States v. Raddatz, 447 U.S. 667 (1980) 17

United States v. Riley, 78 F.3d 367 (8th Cir. 1996) 25

United States v. Walker, 943 F. Supp. 1326 (D. Colo. 1996) 39

Ward v. Village of Monroeville, 409 U.S. 57 (1972) 35

Wilkinson v. Austin, 545 U.S. 209 (2005) 16

Wolf v. McDonnell, 418 U.S. 539 (1974) 13

Yakus v. United States, 321 U.S. 414 (1944) 24

CONSTITUTIONAL AMENDMENT

U.S. Const. amend. V 13, 19, 20

TABLE OF AUTHORITIES – Continued

Page

CODES, RULES AND STATUTES

21 U.S.C. § 853(e) 39

21 U.S.C. § 853(e)(1)(A) 8

21 U.S.C. § 853(f) 38, 39

Fed. R. Crim. P. 6(d) 10

Fed. R. Crim. P. 32.2 8

Fed. R. Crim. P. 32.2(a) 9

Fed. R. Crim. P. 41(g) 39

OTHER PUBLICATIONS

2 David B. Smith, *Prosecution and Defense of Forfeiture Cases* (2012) 10, 24, 38

Andrew Amelinckx, *Attorney claims police illegally seized $10,000 cash supposed to be used as bail*, The Berkshire Eagle (June 1, 2013), http://www.berkshireeagle.com/portal/news/ci_23366610?source=rss&_loopback=1 30

Dick M. Carpenter II, Ph.D., *et al.*, *Inequitable Justice: How "Equitable Sharing" Encourages Local Police and Prosecutors to Evade State Civil Forfeiture Law for Financial Gain* (2011), *available at* http://www.ij.org/images/pdf_folder/private_property/forfeiture/inequitable_justice-mass-forfeiture.pdf 7

Federal Judge Overrules DC Car Seizure, THENEWSPAPER.COM (July 11, 2012), http://www.thenewspaper.com/news/38/3840.asp 12

TABLE OF AUTHORITIES – Continued

Page

James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights (3d ed. 2008) 27

John Adams, Defence of the Constitutions of Government of the United States (1787), in 6 *The Works of John Adams* 8, 8-9 (Charles Francis Adams ed. 1856).....27

Lewis Carroll, *Through the Looking Glass*.....2

Marian R. Williams, Ph.D., *et al.*, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, at 17 (Institute for Justice, 2010), *available at* http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf 7

Orin Kerr, *The Criminal Charges Against Aaron Swartz (Part 2: Prosecutorial Discretion)*, The Volokh Conspiracy (Jan. 16, 2013, 11:34 PM), http://www.volokh.com/2013/01/16/the-criminal-charges-against-aaron-swartz-part-2-prosecutorial-discretion/ 8

Radley Balko, *Under Asset Forfeiture Law, Wisconsin Cops Confiscate Families' Bail Money*, The Huffington Post (May 21, 2012), http://www.huffingtonpost.com/2012/05/20/asset-forfeiture-wisconsin-bail-onfiscated_n_1522328.html 30

Ray Henry, *In Ga., A Push to Change Civil Forfeiture Laws*, The Atlanta Journal-Constitution (June 15, 2013, 5:22 PM), http://www.ajc.com/ap/ap/crime/in-ga-a-push-to-change-civil-forfeiture-laws/nYL9K/ 7

TABLE OF AUTHORITIES – Continued

Page

Richard Miniter, *Ill-Gotten Gains*, Reason Magazine (Aug./Sept. 1993), http://reason.com/archives/1993/08/01/ill-gotten-gains 34

Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 Clinical L. Rev. (1995).....10

The Federalist No. 54 (James Madison).....27

U.S. Dep't of Justice, *Assets Forfeiture Fund and Seized Asset Deposit Fund, Ann. Fin. Statements FY 2000*, http://www.justice.gov/jmd/afp/01programaudit/auditreport92002.htm 35

U.S. Dep't of Justice, *Assets Forfeiture Fund and Seized Asset Deposit Fund, Ann. Fin. Statements FY 2012*, http://www.justice.gov/oig/reports/2013/a1307.pdf.....35

U.S. Gov't Accountability Office, GAO-12-736, *Justice Assets Forfeiture Fund: Transparency of Balances and Controls Over Equitable Sharing Should Be Improved* 6 (2012), http://www.gao.gov/assets/600/592349.pdf.....34

W. Thomas Dillard, *et al.*, *A Grand Facade: How the Grand Jury Was Captured by Government, Policy Analysis*, Cato, 1 (2003).....9

INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to protecting the right to property, both because individuals' control over their property is a tenet of personal liberty and because property rights are inextricably linked to all other rights. The government's ability to interfere with private property without adequate safeguards gravely threatens individual liberty. For this reason, IJ both litigates original cases to defend property rights and files *amicus curiae* briefs in relevant cases, including *Florida v. Harris*, 133 S.Ct. 1050 (2013); *Sackett v. Environmental Protection Agency*, 132 S.Ct. 1367 (2012); *Alvarez v. Smith*, 558 U.S. 87 (2009); *Bennis v. Michigan*, 516 U.S. 442 (1996); and *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

The federal government's aggressive use of forfeiture poses a grave threat to property rights and can cause irreparable injury when property is withheld before forfeiture is even ordered. The strong pecuniary interest that law enforcement has in maximizing forfeiture proceeds has both distorted police and prosecutorial practices and, in many cases, led to the restraint or seizure of untainted assets.

---

[1] All parties in this case have consented to the filing of this *amicus* brief. Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* IJ, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

In filing this *amicus* brief in support of Petitioners, IJ urges this Court to hold that when the government obtains a pretrial order restraining a defendant's property, due process requires a pretrial evidentiary hearing where the defendant can contest the basis of the restraint, regardless of whether the property is needed to retain counsel. IJ urges this Court, in so holding, to apply the well-suited framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976).

SUMMARY OF ARGUMENT

"[There's the King's Messenger. He's in prison now, being punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all."

"Suppose he never commits the crime?" said Alice.

"That would be all the better, wouldn't it?" the Queen said, as she bound the plaster round her finger with a bit of ribbon.

Alice felt there was no denying that. "Of course it would be all the better," she said: "but it wouldn't be all the better his being punished."

– Lewis Carroll in *Through the Looking Glass*

Congress's procedure for restraining a defendant's property before trial resembles the White Queen's "punish first, have the trial later" approach in Lewis Carroll's classic. At a time when individuals are presumed innocent, prosecutors with unfettered discretion can obtain an *ex parte* order freezing the individuals' property – the very means to secure not only their liberty but the basic necessities of life. The government justifies this punishment before trial to ensure that it can claim the property under forfeiture should the defendant be convicted. Untroubled by the fact that prosecutors stand to benefit from forfeiture, Congress has further denied defendants any guaranteed opportunity to contest the restraint of their property until the trial itself. And what if the judge or jury finds no crime was committed at all? "That would be all the better," Congress implies, indifferent to the hardships imposed on innocent owners. Fortunately, the Due Process Clause does not sanction Congress's backward approach of punishing first.

IJ files this *amicus* brief to explain why due process requires a prompt hearing, regardless of whether the assets are needed for counsel. The right of individuals to be free from arbitrary government interference with their property is deeply rooted in our constitutional history. Based on this Court's precedents, the government cannot withhold a person's property for months without promptly giving him an opportunity to challenge the basis for the government's action.

The heart of due process is the opportunity to be heard. Affording individuals a chance to contest the basis for the deprivation prevents mistaken deprivations of property caused by arbitrary government encroachment. To be of value, the opportunity to be heard must be afforded at a meaningful time and in a meaningful manner.

This Court has developed a three-factored balancing test – the *Mathews* framework[2] – to determine the constitutional adequacy of an opportunity to be heard. For over three decades this Court has applied *Mathews* in a variety of contexts, including criminal, to assess the adequacy of procedures under the Due Process Clause. A majority of circuits addressing the issue presented by this case have applied *Mathews* to require an evidentiary hearing.

The Eleventh Circuit, however, applied the ill-suited *Barker v. Wingo*[3] test, formulated to judge violations of the right to a speedy trial. The *Barker* test looks at the reasonableness of a *delay in process* rather than *what process* is required. Viewing the issue through the wrong lens, the Eleventh Circuit ruled that the defendant should be given a pretrial evidentiary hearing only when he could not otherwise afford counsel of choice. Further, the court incorrectly limited the scope of the hearing to the connection

---

[2] 424 U.S. 319, 321 (1976).

[3] 407 U.S. 514, 530 (1972).

between the restrained property and the offenses charged in the indictment.

Due process requires much more than the Eleventh Circuit's limited hearing. The government argues that because a hearing was granted below, this Court should avoid resolving the proper standard for determining whether a pretrial evidentiary hearing is required at all. However, the same *Mathews* analysis that dictates a hearing also informs the question of what that hearing looks like, while the *Barker* test does not.

Applying *Mathews*, due process requires a hearing where an individual may contest the factual basis of the restraint of property. First, both the private interests of the individual in his property and the irreparable injury caused by its interim deprivation warrant a prompt evidentiary hearing. Second, without a prompt hearing, the risk of error is high because of the direct financial stake law enforcement has in the trial's outcome. Moreover, neither the initial *ex parte* proceeding nor a more limited hearing is adequate to safeguard against mistaken deprivations. Third, the government's interest in avoiding additional safeguards is minimal. Congress provided a specific procedure to preserve assets for forfeiture by seizing them – a procedure that allows for pretrial evidentiary hearings to contest the seizure. Additionally, existing criminal and civil cases show that a pretrial evidentiary hearing would not pose an undue administrative burden. Finally, the government has

adequate means to avoid revealing its trial strategy, including not seeking a restraining order.

In sum, this Court should reject the notion that the Due Process Clause condones the pretrial restraint of property without affording individuals a pretrial evidentiary hearing to contest the factual basis for the restraint.

ARGUMENT

I. The Pretrial Restraint of Assets Is a "Nuclear Weapon" of Prosecutors, Requiring Strong Procedural Safeguards To Prevent Unjustified Deprivations of Property.

This Court has aptly characterized the pretrial restraint of assets as a "nuclear weapon."[4] The government argues that this powerful weapon should be left to the unfettered discretion of prosecutors, with no or limited opportunity for property owners to be heard. The Constitution forbids vesting such unchecked power in the hands of government officials, particularly when they stand to financially benefit from the outcome of the proceedings. Stacking the deck so heavily in the government's favor conflicts

[4] *Grupo Mexicano de Desarrolo, S.A. v. Alliance Bond Fund*, 527 U.S. 308, 332 (1999) (federal court could not preliminarily enjoin the defendant in an action for money damages from transferring assets in which there was no lien or equitable interest).

with constitutional guarantees of fairness rooted in the Due Process Clause.

Forfeiture proceedings, both criminal and civil, warrant extra caution because they involve direct financial incentives for the government. Under federal and most state laws, forfeiture proceeds go directly to fund law-enforcement activities.[5] Under the equitable sharing program, state and local law enforcement receive up to 80 percent of proceeds for forfeiture cases they refer to federal law enforcement.[6] When a trial results in forfeiture, prosecutors' offices can reap direct financial benefits, creating a systemic bias in targeting cases that entail potentially lucrative forfeitures.[7] Consequently, prosecutors have

---

[5] Marian R. Williams, Ph.D., *et al.*, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, at 17 (Institute for Justice, 2010), *available at* http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.

[6] *See generally*, Dick M. Carpenter II, Ph.D., *et al.*, *Inequitable Justice: How "Equitable Sharing" Encourages Local Police and Prosecutors to Evade State Civil Forfeiture Law for Financial Gain* (2011), *available at* http://www.ij.org/images/pdf_folder/private_property/forfeiture/inequitable_justice-mass-forfeiture.pdf.

[7] For example, a Fulton County prosecutor used forfeiture funds for football tickets, office parties, and other questionable purchases. Ray Henry, *In Ga., A Push to Change Civil Forfeiture Laws*, The Atlanta Journal-Constitution (June 15, 2013, 5:22 PM), http://www.ajc.com/ap/ap/crime/in-ga-a-push-to-change-civil-forfeiture-laws/nYL9K/.

little impetus to appropriately weigh competing interests or the defendant's rights or hardships.[8]

In criminal cases, the pretrial restraint of property is a discretionary "add-on to ordinary prosecution" in which the potential for abuse is real.[9] Following an indictment, the prosecutor can immediately obtain a restraining order against the defendant's property in an *ex parte* proceeding, if he: (1) shows the indictment charges a forfeitable offense; and (2) simply alleges that the property identified in the notice of forfeiture would be subject to forfeiture following a conviction.[10]

Further, prosecutors enjoy tremendous discretion at each stage of the criminal process. They initiate the criminal action and choose the nature and number of charges.[11] In this case, when the magistrate judge initially found that only $140,000 of the

---

[8] *See Morrison v. Olson*, 487 U.S. 654, 728-29 (1988) (Scalia, J., dissenting) (warning of potential for abuse when prosecutors do not have to weigh competing interests); *United States v. Kaley* (*Kaley II*), 677 F.3d 1316, 1331 (11th Cir. 2012) (Edmondson, J., concurring).

[9] *Kaley II*, 677 F.3d at 1331-32 (Edmondson, J., concurring).

[10] *See* 21 U.S.C. § 853(e)(1)(A); Fed. R. Crim. P. 32.2.

[11] *See, e.g.*, Orin Kerr, *The Criminal Charges Against Aaron Swartz* (*Part 2: Prosecutorial Discretion*), The Volokh Conspiracy (Jan. 16, 2013, 11:34 PM), http://www.volokh.com/2013/01/16/the-criminal-charges-against-aaron-swartz-part-2-prosecutorial-discretion/ (describing prosecutorial overreaching in Aaron Swartz case as "business as usual in federal criminal cases around the country").

$500,000 restrained assets were traceable to the alleged offenses, prosecutors filed a superseding indictment adding a money-laundering count.[12] This additional count enabled the government to notice for forfeiture the Kaleys' home and the full $500,000 certificate of deposit under a broad "facilitation" theory – a theory that has troubled members of this Court.[13]

The only hurdle prosecutors must clear is convincing a grand jury to indict for probable cause – a low hurdle given that grand juries essentially operate as an arm of the prosecutor.[14] Because forfeiture is simply an aspect of punishment and not a separate crime,[15] the grand jury is not required to (and in fact does not) consider whether the property noticed in the

---

[12] *See* Pet'rs' Merits Brief at 9.

[13] *James Daniel Good*, 510 U.S. at 81 (1993) (Thomas, J., concurring in part and dissenting in part) (noting disturbing breadth of forfeiture statutes "which subject to forfeiture *all* real property that is used, or intended to be used, in the commission or even the *facilitation* of a [crime].").

[14] *See* W. Thomas Dillard, *et al.*, *A Grand Facade: How the Grand Jury Was Captured by Government, Policy Analysis*, Cato, 1 (2003) ("[O]ver-reaching prosecutors have been able to pervert the grand jury, whose original purpose was to check prosecutorial power, into an inquisitorial bulldozer that enhances the power of government and now runs roughshod over the constitutional rights of citizens.").

[15] *See Libretti v. United States*, 516 U.S. 29, 38-39, 41 (1995); Fed. R. Crim. P. 32.2(a) (notice of forfeiture should not be designated as separate count in indictment).

indictment is subject to forfeiture.[16] Additionally, the defendant has no right to appear or testify in grand jury proceedings; the prosecutor has no duty to disclose exculpatory evidence; and the government can rely entirely on hearsay or illegally acquired evidence.[17] "The grand jury . . . is not a mechanism well designed to protect a defendant against an erroneous deprivation."[18] Furthermore, prosecutors exercise significant leverage in the plea-bargaining process.[19]

The defendant, on the other hand, is placed in a precarious position. Potentially unable to secure his liberty by paying bail or to use his property to obtain private counsel, he faces the mighty resources of the federal government.[20] Without an opportunity to contest the restraint of his property, the defendant's ability to provide for himself and his family could be seriously injured. In this case, putting aside the need to pay for counsel, the Kaleys would need to liquidate

---

[16] 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶ 14.02[2] (2012).

[17] Fed. R. Crim. P. 6(d).

[18] *United States v. Kaley* (*Kaley I*), 579 F.3d 1246, 1267 (11th Cir. 2009) (Tjoflat, J., concurring).

[19] "[D]efense counsel may feel more like a beggar than a bargainer, left with little more than the unenviable chore of imploring a mean-spirited prosecutor to be fair or reasonable." Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 Clinical L. Rev. 73, 94 (1995).

[20] *See Kaley II*, 677 F.3d at 1332 (Edmondson, J., concurring).

their unrestrained assets – a retirement account and their children's college funds – incurring penalties of $183,500 just to pay for living expenses.[21] Those of more modest means would face a tougher predicament.

In civil cases, the government's restraint of property pending trial is even more problematic. Prosecutorial overreaching is also troubling in civil-forfeiture actions. For example, in 2009, the U.S. Attorney for Massachusetts brought a civil-forfeiture action against a family-run budget motel, valued at over $1.5 million. The complaint was based solely on a few "isolated drug-related incidents spread out over the course of more than a decade, none of which involved the [m]otel owner or employees."[22] After more than four years of litigation, the district court ruled that the government never should have filed the case in the first place.[23] Notably, during that time, the government's *lis pendens* prevented motel owner Russell Caswell from securing a loan to pay private counsel. Mr. Caswell had considered settling the case due to the financial hardship. It was only through the *pro bono* assistance provided by *amicus* that Mr. Caswell

---

[21] *See* Pet'rs' Merits Br. at 10.

[22] *United States v. 434 Main St.*, Civ. A. No. 09-11635-JGD, 2013 WL 308981, *1 (D. Mass. Jan. 24, 2013).

[23] *Id.* at *19-22 (government lacked sufficient evidence to prove motel was substantially connected to drug crimes to support forfeiture).

was able to win his property back without jeopardizing his retirement savings.

Consider also 22-year-old Frederick Simms, whose vehicle was seized in 2011 without any hearing and retained during the criminal trial. Even after being acquitted of all charges, he needed to pay $800 for the opportunity to contest the seizure at the ensuing civil-forfeiture trial. Worse, the forfeiture trial did not commence until six months after the acquittal and was expected to last over a year. Mr. Simms's reaction is telling of the typical hardships faced by property owners:

> I cannot afford to pay $800 to try to get my car back. All of the money I make from my [$12 hourly] wages goes to transportation, rent, daycare, utilities, groceries, car insurance, and the $360 a month I pay on the car loan . . . for a car I can't even use.[24]

Fortunately for Mr. Simms, a federal court ruled that due process required immediate release of his car pending forfeiture proceedings.[25]

Mr. Caswell and Mr. Simms's victories are unusual. All too often, property owners ensnared in forfeiture proceedings settle for a fraction of their

---

[24] *Federal Judge Overrules DC Car Seizure*, THENEWSPAPER.COM (July 11, 2012), http://www.thenewspaper.com/news/38/3840.asp.

[25] *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 104-05 (D.D.C. 2012).

properties' worth or simply abandon hope of retrieval, particularly if the property's value is less than the costs of the legal battle.

Allowing the government to carry out potentially debilitating seizures or restraints of property without an adequate opportunity to be heard eviscerates the fundamental guarantee of the Due Process Clause. With prosecutors holding all the cards, prompt and meaningful judicial oversight is a crucial check against unjust deprivations of property.

II. The Heart of Due Process Is an Opportunity To Be Heard at a Meaningful Time and in a Meaningful Manner.

The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This constitutional command protects individuals and their property against arbitrary government action by ensuring procedural fairness.[26] Here, the pretrial order restraining the Kaleys' home and assets deprived them of property interests protected by the Due Process Clause.[27] The only question is whether the Kaleys were afforded all the process that the Constitution requires. After all,

---

[26] *See, e.g.*, *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

[27] Even temporary or partial deprivations of property are subject to due process constraints. *See, e.g.*, *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991).

"the *Due* Process Clause is not the *Some* Process Clause."[28]

A necessary element to due process is the opportunity to be heard.[29] By promoting the affected individual's participation, the opportunity to be heard prevents unfair or mistaken deprivations.[30] To accomplish this goal, the opportunity "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

To determine the adequacy of the opportunity to be heard when the government seeks to deprive an individual of property, this Court invariably has balanced the individual's interests against the government's interests, an approach that ultimately led this Court to formulate the now-familiar *Mathews* framework. As discussed below, this Court has used this framework to determine the constitutional sufficiency of an opportunity to be heard in a variety of contexts, including in criminal cases. Nevertheless, the Eleventh Circuit applied a different test, causing it erroneously to limit both when a hearing is required and the scope of that hearing.

---

[28] *Medina v. California*, 505 U.S. 437, 463 (1992) (Blackmun, J., dissenting).

[29] *James Daniel Good*, 510 U.S. at 53.

[30] *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

A. *Mathews* Provides the Proper Framework To Determine What Constitutes a Sufficient Opportunity To Be Heard Under the Due Process Clause.

For over a half-century, this Court has balanced the individual and government interests to determine the sufficiency of procedures when the government seeks to take an individual's property. Even before *Mathews*, this Court weighed these countervailing interests to determine whether due process was met.[31] In *Mathews*, this Court articulated the three factors courts must consider in identifying the "specific dictates of due process":

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and the administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 334-35. Although the *Mathews* framework was developed in the administrative context, for more than 35 years this Court has consistently applied it in a variety of other situations to determine whether an

---

[31] *See, e.g., Fusari v. Steinberg*, 419 U.S. 379, 388 (1975); *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

individual was afforded constitutionally adequate procedures.[32]

Most notably, this Court applied the *Mathews* framework when it last ruled on the timing and scope of a required hearing in the forfeiture context. In *James Daniel Good*, this Court held that individuals were entitled to a hearing before the government could seize their homes for potential forfeiture. This Court emphasized that the Due Process Clause provided stand-alone guarantees, in addition to those of the Fourth Amendment. 510 U.S. at 49. Moreover, this Court concluded that due process required a pre-seizure hearing even though, in an *ex parte* proceeding, a judge already had found probable cause that the property was subject to forfeiture. *Id.* at 47. Although *James Daniel Good* involved seizure and not restraint of property, the same analysis holds true here. Apart from separate Sixth Amendment concerns for the right to counsel, the Due Process Clause guarantees a prompt evidentiary hearing to contest

---

[32] *Turner v. Rogers*, 131 S.Ct. 2507 (2011) (whether entitled to counsel at civil-contempt proceeding for failing to pay child support); *Wilkinson v. Austin*, 545 U.S. 209 (2005) (procedures governing assignment to Supermax prison); *Gilbert v. Homar*, 520 U.S. 924 (1997) (suspension of university officer before hearing); *Santosky v. Kramer*, 455 U.S. 745 (1982) (standard of proof for termination of parental rights over objection); *Addington v. Texas*, 441 U.S. 418 (1979) (standard of proof for involuntary indefinite civil commitment to mental hospital).

the government's *ex parte* showing of probable cause to restrain the property.[33]

This Court has not limited the application of *Mathews* to the strictly civil context. A plurality of this Court applied the *Mathews* framework to wartime detentions off the battlefield. In *Hamdi v. Rumsfeld*, this Court held that under *Mathews*, a citizen detained as an enemy combatant was entitled to receive "notice of the factual basis for his classification and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." 542 U.S. 507, 533 (2004).

Likewise, *Mathews* has guided the Court to assess the adequacy of criminal procedures under the Due Process Clause.[34] For example, in *Ake v. Oklahoma*, this Court held that *Mathews* was the appropriate test for determining whether an indigent defendant was entitled to a psychiatrist to present his insanity defense. 470 U.S. 68, 77 (1985). Applying the *Mathews* framework, this Court ruled that due process required a court-appointed psychiatrist when the

---

[33] *See, e.g., United States v. Holy Land Found. for Relief & Dev.*, 493 F.3d 469, 475 (5th Cir. 2007).

[34] *See, e.g., United States v. Raddatz*, 447 U.S. 667 (1980) (citing *Mathews* in challenge to federal statute authorizing magistrates to make findings and recommendations on motions to suppress); *Burns v. United States*, 501 U.S. 129, 148 (1991) (Souter, J., dissenting) (arguing *Mathews* analysis could determine what process is due under federal sentencing guidelines).

defendant shows that his sanity at the time of the offense will likely be a significant factor at trial.[35]

A majority of circuits have applied *Mathews* to the precise issue in this case, holding that due process required a pretrial evidentiary hearing.[36] The Eleventh Circuit's departure from this proven framework led it to commit the two fundamental errors discussed below.

B. By Wrongly Applying *Barker v. Wingo*'s Speedy-Trial Test, the Eleventh Circuit Incorrectly Limited Both When a Pretrial Evidentiary Hearing Is Required and the Scope of That Hearing.

Constrained by its own erroneous precedent, the Eleventh Circuit's application of the *Barker v. Wingo* speedy-trial test caused it to wrongly limit both when

---

[35] *But see Medina*, 505 U.S. at 443 ("In our view, the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process."). *Medina* is distinguishable on principles of federalism that are not implicated in this case. Because this Court was reviewing the adequacy of state criminal procedures, it was mindful of the deference it owed state legislatures. *Id.* at 446.

[36] *United States v. E-Gold, Ltd.*, 521 F.3d 411, 415 (D.C. Cir. 2008); *United States v. Farmer*, 274 F.3d 800, 803-04 (4th Cir. 2001); *United States v. Jones*, 160 F.3d 641, 645-46 (10th Cir. 1998); *United States v. Michelle's Lounge*, 39 F.3d 684, 697, 700-01 (7th Cir. 1994); *United States v. Monsanto*, 924 F.2d 1186, 1193, 1203 (2d Cir. 1991) (*en banc*).

a pretrial evidentiary hearing is required and the scope of that hearing. The *Barker* test determines whether a delay between an indictment and the criminal trial violated a defendant's Sixth Amendment right to a speedy trial, not whether the procedure itself satisfied the Fifth Amendment right to due process. Notwithstanding this Court's use of the *Barker* test to determine the reasonableness of delay in filing a civil-forfeiture action, this test is ill-suited to determine either whether a pretrial evidentiary hearing is required or the scope of that hearing.

In *Barker v. Wingo*, this Court set criteria by which to judge whether a defendant's right to a speedy trial was violated. 407 U.S. at 516. Rejecting "rigid approaches," the Court established a four-part test that weighed the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530. In fashioning this test, the Court was mindful of the differences between the right to a speedy trial and other constitutional guarantees. *Id.* at 519-22. Unlike other constitutional rights, deprivation of the right to a speedy trial "may work to the accused's advantage." *Id.* at 521 ("Delay is not an uncommon defense tactic."). This distinction between the right to a speedy trial and other constitutional guarantees weighs against importing *Barker*'s balancing test into other contexts.

Nevertheless, more than a decade later, this Court used *Barker* to answer a separate inquiry – the reasonableness of the government's delay in filing a civil-forfeiture action. *See United States v. $8,850,*

461 U.S. 555 (1983). In that case, the government seized a woman's cash for failure to comply with currency reporting requirements but failed to file the forfeiture complaint until 18 months after the seizure. *Id.* at 556. Recognizing that "*Barker* dealt with the Sixth Amendment right to a speedy trial rather than the Fifth Amendment right against deprivation of property without due process of law," the Court used the *Barker* test because the "claim here – which challenges only the length of time between the seizure and the initiation of the forfeiture trial – mirrors the concern of undue delay encompassed in the right to a speedy trial." *Id.* at 564.[37] Applying *Barker*, the Court concluded that the delay did not violate due process.[38]

Relying predominantly on *$8,850* (and without even mentioning *Mathews*), the Eleventh Circuit had previously and incorrectly applied *Barker*'s speedy-trial test to hold that the pretrial restraint of a defendant's assets did not violate due process. *See United States v. Bissell*, 866 F.2d 1343, 1352 (11th Cir. 1989). In *Kaley I*, the Eleventh Circuit felt constrained to follow this precedent applying *Barker*.[39]

---

[37] *See also id.* at 562 (property owner was not challenging lack of pre-seizure hearing nor "sufficiency of the judicial hearing that was eventually held").

[38] *Id.* at 569-70. Justice Stevens dissented, concluding that "a rule that allows the Government to dispossess a citizen of her property for more than 18 months without her consent and without a hearing is a flagrant violation of the Fifth Amendment." *Id.* at 570 (Stevens, J., dissenting).

[39] *Kaley I*, 579 F.3d at 1252.

However, by all accounts, *Bissell* was wrongly decided.[40] Even the government has conceded that *Bissell* is wrong.[41]

The *Barker* test, which focuses on the reasonableness of the delay in process, is ill-suited to deciding what process is even required. By weighing the prejudice to the defendant at trial (rather than the private interests weighed in *Mathews*), the *Barker* test gives short shrift to property rights, focusing only on whether that property is needed to retain counsel, or at most fund litigation expenses for investigators or experts. A person who cannot afford basic living expenses might not suffer any prejudice at trial but the private interests at stake cannot be disputed. Moreover, the *Barker* test cannot answer questions about what the pretrial evidentiary hearing looks like, including the hearing's scope.

Notably, this Court has not followed *Barker* to determine whether due process has been violated by a delay in holding a hearing. *See City of Los Angeles v. David*, 538 U.S. 715 (2003) (applying *Mathews* and concluding 30-day delay in holding hearing to challenge parking-violation fees did not violate due process) (*per curiam*). Likewise, lower courts have

---

[40] *See Kaley I*, 579 F.3d at 1259 ("If we were writing on a blank slate today we would be inclined . . . to apply . . . *Mathews*."); *Jones*, 160 F.3d at 645-46 n.3 (rejecting *Bissell*'s analysis as wholly unworkable).

[41] *See United States v. Melrose E. Subdivision*, 357 F.3d 493, 499 n.4 (5th Cir. 2004) (Department of Justice's forfeiture expert admits *Bissell* is wrong).

held that the question of whether and by what means forfeitability can be challenged pretrial differs from the question of the speed of the forfeiture proceedings.[42]

The United States urges this Court to avoid resolving this dispute on the proper legal test (*Mathews* or *Barker*) because the court below granted a hearing.[43] In *United States v. Monsanto*, this Court left open the question of whether due process requires a hearing *before* a pretrial restraining order can be imposed because the Second Circuit ordered an evidentiary hearing before entering a restraining order. 491 U.S. 600, 615 n.10 (1989). On remand, the district court held an extensive four-day hearing on the question of probable cause. This Court declined to inquire whether the hearing was adequate because the Second Circuit's *en banc* decision did not address the procedural due process issue. *Id.*

After almost a quarter century, the time has come for this Court to resolve this issue. While the Eleventh Circuit alone applies *Barker* to pretrial restraint of assets, the circuits are split on the proper

---

[42] *See Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008), *vacated as moot, sub nom. Alvarez v. Smith*, 558 U.S. 87 (2009); *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002) (Sotomayor, J.); *Simms*, 872 F. Supp. 2d 90.

[43] Br. of United States on Pet. for Writ of Cert. at 19.

legal test in civil-forfeiture cases.[44] Indeed, this Court was poised to answer this very question in *Alvarez v. Smith*, but the case was mooted. Moreover, unlike in *Monsanto*, the questions of whether and when a hearing is required and the adequacy of that hearing are all properly before this Court and addressed by the Eleventh Circuit, albeit under an incorrect legal standard. Furthermore, the same *Mathews* analysis that governs the adequacy of the hearing informs whether a hearing is required at all. Consequently, unlike in *Monsanto*, resolving whether a pretrial evidentiary hearing is required would not be "pointless." *Id.*

The Kaleys have been deprived of a property interest and are contesting the validity of the restraint without an opportunity to be heard until trial. Undeniably, these facts put them in the terrain of *Mathews*, not *Barker*.

III. Applying *Mathews* Requires a Pretrial Evidentiary Hearing at Which the Owner Can Contest the Validity of the Restraint.

The *Mathews* framework requires a pretrial evidentiary hearing at which the property owner can contest the validity of the restraint. Although the

---

[44] *Compare Krimstock v. Kelly*, 464 F.3d 246, 253-55 (2d Cir. 2006) (relying on *Mathews*) *with United States v. Ninety-Three Firearms*, 330 F.3d 414, 425-26 (6th Cir. 2003) (relying on *Barker*).

Court has carved out distinct exceptions, such as wartime exigencies[45] or public harm,[46] the general rule is that the Constitution prohibits the deprivation of property without a prior hearing. *Connecticut v. Doehr*, 501 U.S. 1, 9-10, 16-18 (1991) (holding prejudgment attachment of real estate, without prior notice or hearing or a showing of exigent circumstances, violated due process).

Forfeiture does not constitute a *per se* exception to requiring a pre-restraint hearing. *See, e.g., James Daniel Good*, 510 U.S. at 53.[47] Rather, under the Constitution, courts must hold a pre-restraint evidentiary hearing unless the government shows why it needs to withhold notice and an opportunity to be heard until after the restraining order is entered.[48]

---

[45] *See, e.g., Yakus v. United States*, 321 U.S. 414 (1944) (failure to hold hearing prior to issuance of price controls for beef in wartime does not offend due process).

[46] *See, e.g., N. Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (summarily seizing food as unfit for human consumption without preliminary hearing did not deny owner due process).

[47] *See also* Smith, *supra*, ¶ 14.02[1] ("If the seizure involves real property, an opportunity for a pre-seizure adversarial hearing would be required by [] *James Daniel Good*."). Additionally, unlike *in rem* civil-forfeiture cases, courts need not obtain jurisdiction by seizing the property in *in personam* criminal forfeiture actions like this case. *See James Daniel Good*, 510 U.S. at 57; *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974).

[48] *See Nat'l Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 205-09 (D.C. Cir. 2001) (organization entitled to notice and hearing before State Department designates

(Continued on following page)

Indeed, in *James Daniel Good*, this Court noted that an *ex parte* restraining order could be obtained if "there is evidence, in a particular case, that an owner is likely to destroy his property when advised of the pending action." *Id.* at 58.

Even assuming the Government made this kind of particularized showing at the *ex parte* hearing in this case, due process nevertheless also requires an immediate post-restraint opportunity to contest the validity of the restraint of assets. The private interests at stake and the risk of error caused by the profit incentive underlying forfeiture outweigh the government's minimal interests.

A. The Individual's Right to Property and the Irreparable Injury That Can Result from Deprivation Until Trial Necessitate a Pretrial Evidentiary Hearing.

The private interest at stake in this case is of enormous magnitude. Under federal law, the government can obtain an *ex parte* restraining order against assets not yet proven to be tainted. Putting aside

---

it as terrorist, unless Secretary can show need to withhold notice and hearing until after designation because of property interests affected by terrorist designation); *United States v. Riley*, 78 F.3d 367, 370 (8th Cir. 1996) (before post-indictment restraining order may issue, "government must demonstrate at hearing that the defendant is likely guilty and that the property to be restrained will be subject to criminal forfeiture").

other constitutional rights that may be infringed when seizing an individual's property (like the right to counsel[49] or freedom of speech[50]), depriving an individual of his or her own property without an opportunity to be heard offends the strong tradition of property rights in this nation. "Property rights, in themselves, deserve to be amply guarded by American courts. But when a citizen's liberty (as in the present case) depends to a high degree on his property, the stakes are particularly high." *Kaley II*, 677 F.3d at 1332 (Edmondson, J., concurring). Furthermore, the interim deprivation of property can irreparably injure an individual's ability to pay not only for counsel, but also necessary living expenses.

1. The Right to Property, in Itself, Is Entitled to Great Weight.

Private-property rights form the foundation of a free society and were fundamental to this nation's founding. A primary reason that individuals came together to form government was not to *create* the right to property, but to help *secure* it. As James Madison stated, "Government is instituted no less for protection of the property, than of the persons, of

---

[49] *See* Pet'rs' Merits Br. at 53.

[50] *See, e.g.*, *Fort Wayne Books v. Indiana*, 489 U.S. 46, 65-66 (1989) (pretrial seizure of bookstore owner's books and films based on probable cause but before judicial determination that seized items were, in fact, obscene violated First Amendment).

individuals."[51] Moreover, the Founders correctly viewed strong private-property rights as the most effective bulwark against other usurpations of liberty.[52] "Property is surely a right of mankind as real as liberty. . . . The moment the idea is admitted into society that property is not sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."[53]

This Court has consistently recognized the "high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference."[54] In *Lynch v. Household Finance Corporation*, this Court observed, "the dichotomy between personal liberties and property is a false one." 405 U.S. 538, 552 (1972). Similarly, this Court has rejected the idea that property rights "should be relegated to the status of a poor relation" to rights protected by the First or Fourth Amendments. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). And perhaps most forcefully, this Court noted that "[i]ndividual freedom finds tangible

---

[51] The Federalist No. 54 (James Madison).

[52] James W. Ely, Jr., The Guardian of Every Other Right: A Constitutional History of Property Rights xi (3d ed. 2008) ("The founding generation stressed the significance of property ownership as a safeguard for political liberty against arbitrary government.").

[53] John Adams, Defence of the Constitutions of Government of the United States (1787), in 6 *The Works of John Adams* 8, 8-9 (Charles Francis Adams ed. 1856).

[54] *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

expression in property rights." *James Daniel Good*, 510 U.S. at 61.

Particularly when judging the adequacy of procedures before an individual can be deprived of property, this Court has consistently held the right to property to be "a private interest of historic and continuing importance." *Id.* at 53-54. For example, this Court has recognized that the right to maintain control over one's home deserves the highest protection. *Id.* at 54 (seizure of house "deprived Good of valuable rights of ownership, including the right of sale, the right of occupancy, the right to unrestricted use and enjoyment, and the right to receive tenants"). Other forms of property also enjoy strong protection, even if not needed to pay for counsel or the absolute necessities of life. This Court has found property interests in goods, household furniture, and appliances, significant enough to warrant at least a prompt, post-deprivation hearing to contest the seizure's validity.[55] The Due Process Clause does not merely protect some property; it protects all property.

Moreover, this Court has invalidated encumbering property rights short of seizure without procedural safeguards. Although the government has not actually seized the Kaleys' home or other property, the restraining order significantly interferes with their property rights. *See Doehr*, 501 U.S. at 12 ("[E]ven

---

[55] *See, e.g., Mitchell v. W.T. Gant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection."). In striking down Connecticut's *ex parte* prejudgment attachment procedures for real estate, this Court observed that "attachment ordinarily clouds title, impairs the ability to sell or otherwise alienate the property, taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause." *Id.* at 11.

Given the constitutional imperative to protect property rights, courts must be vigilant against wrongful deprivation by the government by affording individuals an opportunity to contest the deprivation when it matters most.

2. Because the Interim Deprivation of Property Causes Irreparable Injury, Due Process Requires a Pretrial Evidentiary Hearing.

Beyond the strong interest that each citizen has in his or her property generally, the restraint of a citizen's property can cause irreparable injury. To protect against this injury, the Constitution requires significant procedural safeguards.

Depriving people of property not proven to be tainted can work a great hardship, pauperizing wealthy defendants and especially burdening those of

more modest means. It can prevent the individual from defending against a prosecution by securing counsel, as in this case,[56] or even bail money,[57] as in the case of Beverly Greer.[58] After Greer's son was arrested on drug charges, a drug task force in Brown County, Wisconsin told Greer to bring $7,500 in cash as bail. When she brought the money to the jail, police confiscated it as drug proceeds under state forfeiture laws even though she could prove the legitimacy of the funds through tax returns and disability checks. It took four months and the help of counsel to finally recover the money that police seized from her.[59]

Restraining property pretrial also "may deprive an [individual] of the very means by which to live

---

[56] *Kaley II*, 677 F.3d at 1330 (Edmondson, J., concurring) ("By freezing a citizen's property at a time when he is presumed innocent of crime, the citizen (and as a practical matter, his family and perhaps others) is subjected to severe hardship . . . includ[ing] the inability to employ counsel of Defendants' choice to defend them in court from the mighty power of the federal government.").

[57] *See Commissioner of IRS v. Shapiro*, 424 U.S. 614, 620 (1976).

[58] *See* Radley Balko, *Under Asset Forfeiture Law, Wisconsin Cops Confiscate Families' Bail Money*, The Huffington Post (May 21, 2012), http://www.huffingtonpost.com/2012/05/20/asset-forfeiture-wisconsin-bail-confiscated_n_1522328.html.

[59] *See also* Andrew Amelinckx, *Attorney claims police illegally seized $10,000 cash supposed to be used as bail*, The Berkshire Eagle (June 1, 2013), http://www.berkshireeagle.com/portal/news/ci_23366610?source=rss&_loopback=1.

while he waits" for trial.[60] Restraining assets can harm the ability of those of more modest means "to obtain essential food, clothing, housing, and medical care";[61] to make mortgage[62] or car payments; or pay utility[63] and other bills. Moreover, the restraint can damage a person's credit rating, reducing the ability to obtain a loan to pay for these necessities.[64] As this Court has repeatedly recognized, the Due Process Clause requires a hearing before the government can deprive individuals of property needed to pay for living expenses.[65]

Even if the property owner ultimately prevails at trial and the assets are returned, the interim

---

[60] *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970); *id.* at 264 ("[The] need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress. . . .").

[61] *Id.*

[62] *Doehr*, 501 U.S. at 11 ("[A]ttachments, liens, and similar encumbrances" can "place an existing mortgage in technical default where there is an insecurity clause.").

[63] *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 18 (1978) ("Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of times may threaten health and safety.").

[64] *Doehr*, 501 U.S. at 11.

[65] *See, e.g., Craft*, 436 U.S. at 22 (due process requires notice of availability of procedures for disputing utility bill and administrative procedure for customer complaints prior to termination of services); *Goldberg*, 397 U.S. at 266 (New York's termination of welfare benefits without prior evidentiary hearing denied due process).

deprivation works an irreparable injury. This Court has repeatedly cautioned that a final determination, "coming months after the seizure, would not cure the temporary deprivation that an earlier hearing might have prevented." *James Daniel Good*, 510 U.S. at 56.[66] The availability of an eventual trial "is no recompense for losses caused by erroneous seizure." *Id.*

> This Court has [] repeatedly held that, at least where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties, the Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made.[67]

Just as in these cases, the preconviction freezing of assets without affording the owner an opportunity to be heard inflicts an irreparable injury.

In sum, both the individual's right to property and the irreparable injury caused by the length of the

---

[66] *See also Doehr*, 501 U.S. at 15 ("It is true that a later hearing might negate the presence of probable cause, but this would not cure the temporary deprivation that an earlier hearing might have prevented."); *Craft*, 436 U.S. at 20 ("Although utility services may be restored ultimately, the cessation of essential services for any appreciable time works a uniquely final deprivation.").

[67] *Shapiro*, 424 U.S. at 629.

deprivation before trial necessitates a prompt post-restraint hearing.

B. The Profit Incentive Facing Law Enforcement Creates a High Risk of Erroneous Deprivation, Which Can Only Be Mitigated By a Pretrial Evidentiary Hearing.

The second *Mathews* factor considers the risk of error under current procedures and the probable value of additional safeguards.[68] The direct financial stake inherent in the current system of distributing forfeiture proceeds warrants additional procedural safeguards. A pretrial evidentiary hearing would curb the systemic incentives and mitigate the risk of erroneous deprivations. After first discussing the magnitude of the government's financial interest in forfeiture, this section describes how this Court has been especially vigilant when public officials stand to financially benefit from the outcome of government proceedings. Finally, this section explains why the procedures the Eleventh Circuit has put in place are insufficient to guard against this risk of error.

Allowing law-enforcement officials to retain forfeiture proceeds creates a perverse financial incentive to seize forfeitable property. Consequently, under modern civil-forfeiture laws, unlike their predecessors, filling law enforcement's coffers is often the primary purpose of the seizure. As the former chief of the

---

[68] *Mathews*, 424 U.S. at 321.

federal government's Asset Forfeiture and Money Laundering Offices observed, "We had a situation in which the desire to deposit money into the asset forfeiture fund became the reason for being of forfeiture, eclipsing in certain measure the desire to effect fair enforcement of the laws."[69] According to a 2010 GAO report, one of the three primary goals of the U.S. Department of Justice's Assets Forfeiture Fund, the largest of the federal government's forfeiture funds, is "to produce revenues in support of future law enforcement investigations and related forfeiture activities."[70]

Incentivizing law enforcement to seize property under forfeiture has caused federal forfeitures to grow exponentially, as illustrated by the Assets Forfeiture Fund. In 1986, the year after it was created, the fund took in $93.7 million in proceeds from forfeited assets.[71] By 2008, the fund for the first time in history topped $1 billion in net assets, *i.e.*, forfeiture proceeds free and clear of debt obligations and now available for use by law enforcement.[72] And from

---

[69] Richard Miniter, *Ill-Gotten Gains*, Reason Magazine (Aug./Sept. 1993) 32, 34 (quoting Michael F. Zeldin, former director of the Justice Department's Asset Forfeiture & Money Laundering Office), http://reason.com/archives/1993/08/01/ill-gotten-gains.

[70] U.S. Gov't Accountability Office, GAO-12-736, *Justice Assets Forfeiture Fund: Transparency of Balances and Controls Over Equitable Sharing Should Be Improved* 6 (2012), http://www.gao.gov/assets/600/592349.pdf.

[71] *Id.* at 11.

[72] *Id.*

fiscal years 2000 to 2012, the fund's net assets grew steadily from $536.5 million to $1.6 billion, an increase of over 202 percent.[73]

Giving closer scrutiny to the actions of public officials and agencies when they have a direct financial stake in the outcome of proceedings is nothing new.[74] A long line of cases supports the proposition that when government officials have an incentive to act for self-interested reasons, courts must stand guard against unwarranted deprivations of property. In *Tumey v. Ohio*, this Court overturned a fine where the mayor also sat as a judge and personally received a share of the proceeds.[75] It is not just the prospect of personal gain that merits vigilance. In *Ward v. Village of Monroeville*, this Court held that, where a substantial portion of the town's revenues came from fines, having the mayor sit as a judge violated due process.[76] And in *Marshall v. Jerrico, Inc.*, this Court cautioned about the "possibility that [the official's] judgment will be distorted by the prospect of institutional gain

---

[73] *Compare* U.S. Dep't of Justice, *Assets Forfeiture Fund and Seized Asset Deposit Fund, Ann. Fin. Statements FY 2000*, http://www.justice.gov/jmd/afp/01programaudit/auditreport92002.htm *with Ann. Fin. Statements FY 2012*, http://www.justice.gov/oig/reports/2013/a1307.pdf.

[74] *See Harmelin v. Michigan*, 501 U.S. 957, 977 n.9 (1991) (Scalia, J.) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.").

[75] 273 U.S. 510 (1927).

[76] 409 U.S. 57 (1972).

as a result of zealous enforcement efforts." 446 U.S. 238, 250 (1980).[22]

In light of the strong profit incentive underlying forfeiture laws, relying on *ex parte* procedures to restrain assets creates an unacceptable risk of error. In criticizing the *ex parte* summary designation of groups as Communist, Justice Frankfurter famously remarked:

> [F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring). An *ex parte* proceeding "affords little or no protection to the innocent owner." *James Daniel Good*, 510 U.S. at 55. The "Government is not required to offer any evidence on the question of innocent ownership or other potential defenses a claimant might have. Nor would that inquiry, in the *ex parte* stage, suffice to protect the innocent owner's interests." *Id.* Additionally, a grand jury, when issuing an indictment, is not required to

---

[22] *Id.* at 249-50 ("A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.").

find probable cause that the property is subject to forfeiture.

Moreover, a hearing limited to the nexus between the property and the criminal charges fails to safeguard the interests of the innocent. In issuing a restraining order, the magistrate judge invariably, as here, incorrectly relies on the indictment.[78] Without an evidentiary hearing, there has been no independent finding of probable cause to believe that the assets are forfeitable. Just like in *Hamdi*,[79] *James Daniel Good*,[80] and other cases,[81] property owners must be afforded the opportunity to rebut the showing of probable cause.

C. The Government's Interest in Avoiding a Pretrial Evidentiary Hearing Is Minimal.

Under the third *Mathews* factor, the government's interest in avoiding a pretrial evidentiary hearing is minimal. The government relies on three justifications: (1) to preserve assets from being dissipated before trial; (2) to avoid the administrative and financial burden of a pretrial hearing; and (3) to avoid prematurely disclosing its case before trial. None

---

[78] *Kaley II*, 677 F.3d at 1327; *Jones*, 160 F.3d at 645.

[79] 542 U.S. at 509.

[80] 510 U.S. at 62.

[81] *Doehr*, 501 U.S. at 15.

of these justifications outweigh the countervailing *Mathews* factors.

First, the Government's interest in preserving assets for forfeiture is unavailing for two reasons. Initially, the fact that assets will be dissipated is what justifies the *ex parte* restraint without prior notice or opportunity to be heard. The dissipation of property does not, however, justify withholding a pretrial evidentiary hearing that affords a meaningful opportunity to contest whether the property is even subject to forfeiture.[82]

Additionally, Congress specifically set forth a procedure to ensure the availability of property for forfeiture. Under 21 U.S.C. § 853(f), the government may seize property when the court determines that a restraining order may not be sufficient to preserve the property for any eventual forfeiture. In using this procedure, the government may not rest upon the indictment for its probable-cause showing.[83] Instead, it must demonstrate probable cause to believe the

---

[82] *Compare Calero-Toledo*, 416 U.S. at 679 (*ex parte* seizure of yacht for forfeiture without prior notice and hearing satisfied due process because yacht "could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given") *with James Daniel Good*, 510 U.S. at 52-53, 62 (*Calero-Toledo* provided "no occasion to decide whether the same considerations apply to the forfeiture of real property, which by its very nature, can be neither moved nor concealed" and prohibiting *ex parte* seizure of real property without prior notice and hearing).

[83] Smith, *supra*, at 14-16.

property would be subject to forfeiture and a restraining order would not ensure that the property would be preserved.[24] Notably, seizures of property under Section 853(f) can be challenged under Federal Rule of Criminal Procedure 41(g) for lack of probable cause or for failure to demonstrate that a restraining order preserves the property. Because of this opportunity, seizure procedures under Section 853(f) do not raise the same due-process concerns as the Section 853(e) restraining orders at issue in this case. The Eleventh Circuit ignored this crucial distinction below when it applied *Bissell*, a case involving seizure under Section 853(f), not restraint under 853(e).

Second, any administrative burden imposed by a pretrial evidentiary hearing does not justify foregoing the hearing. When an individual is arrested based on prosecutor's assessment of probable cause, this Court has required a prompt probable-cause hearing. *Gerstein v. Pugh*, 420 U.S. 103 (1975). Property owners should get the same opportunity to contest probable cause when their property is seized. In civil-forfeiture cases, several jurisdictions have interpreted the Constitution to require prompt preliminary hearings. *See Krimstock*, 306 F.3d at 44 (Sotomayor, J.); *Simms*, 872 F. Supp. 2d at 92. There is no evidence that these preliminary hearings pose an undue

---

[24] *See, e.g., United States v. Walker*, 943 F. Supp. 1326, 1329-31 (D. Colo. 1996) (voiding Section 853(f) pretrial seizure after determining defendants would not liquidate assets and flee country, contrary to affiant's claims).

administrative burden – especially not one which outweighs the enormous private interests at stake.

Finally, the government argues that a probable-cause hearing would force it to tip its hand and reveal trial witnesses and evidence. But the government can avoid doing so by not moving to restrain the assets.[85] Additionally, to prove probable cause, the government does not need to reveal all the evidence it will rely on at trial. The government can avoid revealing its evidence, including names of witnesses, in other ways, including obtaining a protective order.[86]

---

[85] *See Goldberg*, 397 U.S. at 267 n.14 ("Due process does not . . . require two hearings. If . . . a State simply wishes to continue benefits until after a 'fair' hearing, there will be no need for a preliminary hearing.").

[86] *See Kaley II*, 677 F.3d at 1331 n.1 (Edmondson, J., concurring); *E-Gold, Ltd.*, 521 F.3d at 419; *Monsanto*, 924 F.2d at 1198.

CONCLUSION

For the foregoing reasons, when the government seeks to restrain or seize assets as subject to forfeiture, due process requires a pretrial evidentiary hearing at which a property owner can contest the validity of the seizure.

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
SCOTT G. BULLOCK
DARPANA SHETH*
901 North Glebe Road,
Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
E-mail: wmellor@ij.org,
sbullock@ij.org,
dsheth@ij.org

Counsel for Amicus Curiae

**Counsel of Record*

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-464

In the

Supreme Court of the United States of America

KERRI L. KALEY and BRIAN P. KALEY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONERS

Jonathan Hacker
Co-Chair, Supreme Court
Amicus Committee
National Ass'n of Criminal
Defense Lawyers
1625 Eye Street, N.W.
Washington, D.C. 20006
202-383-5285

Ricardo J. Bascuas
Counsel of Record
Professor, University of
Miami School of Law
1311 Miller Drive
Coral Gables, Fla. 33146
305-284-2672
rbascuas@law.miami.edu

Counsel for NACDL

Library of Congress
Law Library

TABLE OF CONTENTS

Table of Authorities. ii

Interest of the Amicus Curiae. 1

Statement of the Case. 2

Summary of the Argument. 4

Argument. 6

I. A seizure of allegedly forfeitable assets needed to retain counsel is constitutionally unreasonable without more evidential support than ordinary seizures require. 6

A. The right to counsel of choice is of a nature with the rights to speak, associate, and petition the government. 13

B. The retention or appointment of alternate counsel does not mitigate the threatened constitutional violations. 20

II. Recognizing that seizures of assets needed to retain counsel pose the same dangers as other prior restraints on protected speech resolves the issues dividing the courts of appeals. 27

Conclusion. 37

TABLE OF AUTHORITIES

Federal Cases

Ake v. Oklahoma,
470 U.S. 68 (1985). 24

Barker v. Wingo,
407 U.S. 514. 27

Bradshaw v. Ashley,
180 U.S. 59 (1900). 32

Brady v. United States,
397 U.S. 742 (1970). 21

Brooks v. Tennessee,
406 U.S. 605 (1972). 15

Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar, 377 U.S. 1 (1964). 18

Caplin & Drysdale, CA v. United States,
491 U.S. 617 (1989). 6–9, 13 n.1, 26–27, 31

Citizens United v. FEC,
558 U.S. 310 (2010). 24–26

Costello v. United States,
350 U.S. 359 (1956). 33–34

Evans v. Michigan,
133 S.Ct. 1069 (2013). 33

Fort Wayne Books Inc. v. Indiana,
489 U.S. 46 (1989). 10, 30, 31

Geders v. United States,
425 U.S. 80 (1976). 15

Gentile v. State Bar of Nevada,
501 U.S. 1030 (1991). 16, 22

Gideon v. Wainwright,
372 U.S. 335 (1963). 14, 23

Griffin v. Illinois,
351 U.S. 12 (1956). 25

Heller v. New York,
413 U.S. 483 (1973). 30

Herring v. New York,
422 U.S. 853 (1975). 15

Johnson v. Zerbst,
304 U.S. 458 (1938). 14, 21

Legal Servs. Corp. v. Velasquez,
531 U.S. 533 (2001). 9, 19, 22–23

Mathews v. Eldridge,
424 U.S. 319 (1976). 27

McConnell v. FEC,
540 U.S. 93 (2003). 24

Melendez-Diaz v. Massachusetts,
557 U.S. 305 (2009). 16

Microsoft Corp. v. i4i Ltd. Partnership,
131 S.Ct. 2238 (2011). 28 n.2

Morissette v. United States,
342 U.S. 246 (1952). 35

NAACP v. Button,
371 U.S. 415 (1963). 17

New York v. P.J. Video, Inc.,
475 U.S. 868 (1986). 30

Powell v. Alabama,
287 U.S. 45 (1932). 13–15, 22

Ricard v. Williams,
20 U.S. 59 (1822). 32

Roaden v. Kentucky,
413 U.S. 496 (1973) 12

Soldal v. Cook County,
506 U.S. 56 (1992). 11

Union Mine Workers of Am. Dist. 12 v. Illinois State Bar, 389 U.S. 217, 222 (1967). 18

United States v. Bajakajian,
524 U.S. 321 (1998). 13 n.1, 35

United States v. Crozier,
777 F.2d 1376 (C.A.9 1985). 27

United States v. E-Gold, Ltd,
521 F.3d 411 (C.A.D.C. 2008). 27–29

United States v. Farmer,
274 F.3d 800 (C.A.4 2001). 27–28

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006). 12, 14, 20–23

United States v. Holy Land Foundation for Relief,
493 F.3d 469 (C.A.5 2007). 27–29

United States v. James Daniel Good Real Property,
510 U.S. 43 (1993). 11, 18, 31

United States v. Jamieson,
427 F.3d 394 (C.A.6 2005). 28, 30

United States v. Jones,
132 S.Ct. 945 (2012). 12

United States v. Jones,
160 F.3d 641 (C.A.10 1998). 27–28, 30

United States v. Kaley,
579 F.3d 1246 (C.A.11 2009). 2

United States v. Kaley,
677 F.3d 1316 (C.A.11 2012). 2, 3, 27–28, 30

United States v. Lewis,
759 F.2d 1316 (C.A.8 1985). 28–29

United States v. Long,
654 F.2d 911 (C.A.3 1981). 28–29

United States v. Michelle's Lounge,
39 F.3d 684 (C.A.7 1994). 27

United States v. Monsanto,
852 F.2d 1400 (C.A.2 1988). 6, 8, 9, 27–29, 34

United States v. Roth,
912 F.2d 1131 (C.A.9 1990). 28–29

United States v. Salerno,
481 U.S. 739 (1987). 34

Wheat v. United States,
486 U.S. 153 (1988). 22

Federal Rules and Statutes

28 U.S.C. § 524(c). 18

Secondary Sources

Akhil Reed Amar,
The Bill of Rights 115–16 (1998). 21

GAO, Report to Congressional Requesters, Justice Assets Forfeiture Fund (July 2012) (www.gao.gov/assets/600/592349.pdf). 18, 31

INTEREST OF THE AMICUS CURIAE*

The National Association of Criminal Defense Lawyers is a nonprofit, voluntary, professional bar association that works on behalf of criminal-defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of 10,000 and an affiliate membership of almost 40,000, including private criminal-defense lawyers, military-defense counsel, public defenders, law professors, and judges. NACDL is the only national professional bar association for public defenders and private criminal-defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization with full representation in its House of Delegates.

This case implicates NACDL's mission because its resolution will determine whether accused individuals can be deprived of their Sixth Amendment right to counsel of choice based on unsubstantiated allegations.

---

*The parties' Counsel were timely notified of NACDL's intent to file this brief and agreed to its filing. No party or party's counsel authored any part of it or contributed money intended to fund its preparation or submission. NACDL paid all costs associated with preparing and submitting it.

STATEMENT OF THE CASE

The Petitioners, Kerri and Brian Kaley, retained counsel in 2005 when they came under investigation for selling surplus medical supplies on the grey market. *United States v. Kaley*, 677 F.3d 1316, 1318 (C.A.11 2012). In 2007, the federal government indicted the Kaleys and Jennifer Gruenstrass, charging various fraud offenses. *Id.* Two days later, the prosecution obtained from the court an *ex parte* restraining order it expected would force the Petitioners to discharge their counsel, who was familiar with the case, the government's novel theories of guilt, and the applicable law. *Id.* at 1318.

Initially, the government's theory of forfeiture was that the Petitioners' equity in their home constituted proceeds of the alleged offenses. When a magistrate judge limited the restraint to a fraction of the home's value, the government did not acquiesce in the narrower restraint. *Id.* Instead, it added a money-laundering conspiracy charge. *Id.* This allowed it to rely on a statute permitting the restraint not only of "the proceeds of" the alleged fraud but of all property "involved in" the charged crimes. *Id.*; *see also United States v. Kaley*, 579 F.3d 1246, 1250–51 & n.8 (C.A.11 2009). The district court then restrained the full value of the Petitioners' home without an evidentiary hearing. *Kaley*, 677 F.3d at 1319.

The Petitioners appealed, arguing they were entitled to challenge the restraining order at an adversary hearing because it infringed their right to the assistance of counsel of choice. The Eleventh Circuit agreed and, three years after the restraining

order was lodged, the district court afforded the Petitioners a hearing. *Id.* at 1319. In the interim, a jury had acquitted co-defendant Gruenstrass. *Id.* Two unindicted co-conspirators had reached deals with the government and pled guilty to charges brought by information. Petitioners' Brief at 8–11. From defendant to defendant, the government shifted between contradictory theories regarding the alleged fraud. *Id.* The two district judges who accepted guilty pleas voiced doubt as to whether any crime had occurred. *Id.*

Despite these developments, the district court confined the Petitioners' hearing on the restraining order to whether the restrained assets were traceable to property "involved in" the alleged fraud. The court did not require the prosecution to present any evidence substantiating the underlying fraud allegations nor did it allow the Petitioners to dispute that a fraud occurred. *Kaley*, 677 F.3d at 1319–20. The court approved the broad restraining order, and the Eleventh Circuit affirmed. *Id.* at 1322–23.

SUMMARY OF THE ARGUMENT

The government claims the power to veto the Petitioners' choice of counsel by doing little more than alleging that the Petitioners' assets are "traceable" to property "involved in" alleged crimes. This treads on rights guaranteed by the First, Fourth, Fifth, and Sixth Amendments to the United States Constitution and threatens to impair the functioning of our adversary system of criminal justice.

A seizure that risks erroneously denying an accused the assistance of his counsel of choice in a criminal prosecution requires greater evidential support than the courts required of the government in this case. Seizures of allegedly forfeitable property that threaten the irremediable denial of a constitutional right, such as the right to freedom of expression, require a showing greater than mere probable cause. To prevent unconstitutional prior restraints on speech, the government must adduce in such cases evidence substantiating both the underlying charges and the connection of the restrained assets to those alleged offenses.

The right to the assistance of counsel of choice effectuates a defendant's rights to speak and associate freely and to petition the courts. Denying a defendant the exercise of his right to counsel of choice is tantamount to a prior restraint on speech. It harms the defendant whose speech is suppressed, compromises the reliable functioning of the adversary system, and removes from the Nation's legal discourse certain ideas and viewpoints on issues of public importance. Consequently, seizures of allegedly forfeitable property

that threaten to abridge that right must be supported by evidence sufficient to show that the government is likely to prove that the defendant committed a crime and that the seized property is forfeitable as a result. Additionally, in cases where the property is not the alleged proceeds of crime, the government must also show that the forfeiture would not be unconstitutionally disproportional.

According an accused's assets that could fund his defense the same solicitude as assets having expressive aspects, like books or films, is harmonious with this Court's precedents and resolves the issues that have divided the circuit courts of appeals. Because a seizure of such assets carries the same dangers as any other potentially unconstitutional prior restraint on speech, the government must justify it at an adversary hearing with more than mere probable cause. The risk that lesser procedures would cause a defendant to be mistakenly denied his structural right to the assistance of his counsel of choice is constitutionally intolerable.

ARGUMENT

I. A seizure of allegedly forfeitable assets needed to retain counsel is constitutionally unreasonable without more evidential support than ordinary seizures require.

A quarter-century ago, this Court rejected broad claims that the Sixth Amendment exempts from forfeiture or from pre-trial restraint assets that are "the proceeds of" crime but needed to retain counsel of choice. *Caplin & Drysdale, CA v. United States*, 491 U.S. 617, 626 (1989); *United States v. Monsanto*, 491 U.S. 600, 615 (1989). The Court reasoned:

> A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice. A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the Government does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his defense.

491 U.S. at 626. This case does not call into question the holding encapsulated in this bank-robber hypothetical. Rather, this case asks, what does the government have to show to substantiate its claim that the money found in the hypothetical bank robber's possession is *in fact* money stolen from the bank? If, for

example, the accused's money bore serial numbers not matching those of the allegedly stolen bills, the government presumably could not seize the pile of cash without additional evidence. Likewise, if the government could not find anyone to say the bank was actually robbed, there would be no basis for seizing the money the defendant had.

Caplin & Drysdale did not wrestle with whether the restrained assets were actually forfeitable because the defendant admitted, as part of a negotiated plea deal, that his assets were "proceeds of" his "massive drug importation and distribution scheme." 491 U.S. at 619–20, 621. It was the defendant's law firm that argued to this Court that the Sixth Amendment precludes the forfeiture of that portion of its client's drug profits needed to settle its fee. The Court rejected that broad argument, holding that title to the drug-crime proceeds vested in the government at the time of the drug deals. *Id.* at 626. The Court noted that the firm's argument had no limiting principle:

> If defendants have a right to spend forfeitable assets on attorney's fees, why not on exercise of the right to speak, practice one's religion, or travel? The full exercise of these rights, too, depends in part on one's financial wherewithal; and forfeiture, or even the threat of forfeiture, may similarly prevent a defendant from enjoying these rights as fully as he might otherwise.

Id. at 628. That is true—and it is why a seizure of property that threatens the right to counsel of choice

triggers the same procedures as one that threatens other enumerated constitutional rights.

Monsanto did not address in detail what type of hearing is required to support a pre-trial restraint of allegedly forfeitable assets because Peter Monsanto was afforded "an extensive" adversarial hearing:

> We do not consider today, however, whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed. ... [T]he District Court held an extensive, 4-day hearing on the question of probable cause.
>
> ... [G]iven that the Government prevailed in the District Court notwithstanding the hearing, it would be pointless for us now to consider whether a hearing was required by the Due Process Clause. Furthermore, because the Court of Appeals, in its *en banc* decision, did not address the procedural due process issue, *we also do not inquire whether the hearing—if a hearing was required at all—was an adequate one.*

491 U.S. at 615 n.10 (emphasis added).

Consequently, Monsanto, like Caplin and Drysdale, argued in this Court for a blanket rule. He contended that the Sixth Amendment categorically bars the restraint of assets needed to retain counsel *despite* the government having shown at the pre-trial hearing that his assets were the proceeds of drug crimes he committed. Monsanto asked this Court to adopt Judge Winter's interpretation of the forfeiture statute. Brief for Petitioner, *Monsanto*, 1988 WL 1115133, at 50 ("The procedural solution devised by Judge Winter

provides a viable means of avoiding the constitutional dilemma ... . Failing that, this Court has no other means of saving the statute but to render it unconstitutional ... ."). Judge Winter (and Monsanto) accepted that a pre-trial hearing on forfeitability "is not to inquire into the evidentiary strength or weakness of the government's case on criminality." *United States v. Monsanto*, 852 F.2d 1400, 1406 (C.A.2 1988) (*en banc*) (concurrence). He envisioned a hearing "to allow an informed balancing of the relative hardships on the parties according to the traditional principles of equity with regard to preconviction restraints upon a defendant's assets." *Id.*

This Court rebuffed Monsanto's invitation to adopt Judge Winter's view, holding that no equitable balancing could justify the payment of attorney's fees with drug proceeds. 491 U.S. at 613 ("[T]he 'equitable discretion' that is given to the judge under [the statute] turns out to be no discretion at all ... ."). In dicta, the five-justice majority asserted "that assets in a defendant's possession may be restrained in the way they were here based on a finding of probable cause to believe that the assets are forfeitable." *Id.* at 615. Whether probable cause sufficed was not an issue the parties briefed. The Court assumed—but did not decide—throughout Part III.B of the majority opinion that the usual Fourth Amendment probable-cause standard applied. The Court expressly reserved deciding both whether a pre-trial hearing on the seizure of forfeitable assets is required and what the government would have to show at such a hearing. *Id.* at 615 n.10. *See also Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) ("Judicial decisions do not

stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.") (Scalia, J., dissenting).

If *Monsanto*'s assertion that probable cause suffices to restrain the alleged "proceeds of" crime were not dicta, *Monsanto* would conflict with another forfeiture case decided during the 1988 term. *Fort Wayne Books v. Indiana* consolidated two racketeering cases, both predicated on obscenity crimes, for review. 489 U.S. 46, 50–51 (1989). In the first, prosecutors sued Fort Wayne Books under Indiana's civil RICO statute, seizing three bookstores and their contents as property having been "used in the course of ... or realized through" racketeering. *Id.* at 52. The other was a criminal RICO case. *Id.* at 53. Because the criminal defendant had not requested a pre-trial hearing on the question of obscenity and none of his assets had been seized, he was not entitled to a hearing. *Id.* The Court held, however, that Fort Wayne Books was entitled to an adversary hearing at which the prosecutor had to adduce evidence to support the seizure of the allegedly forfeitable assets. *Id.* at 66.

The Court began by assuming "that bookstores and their contents are forfeitable (like other property such as a bank account or a yacht) when it is proved that these items are property actually used in, or derived from," racketeering. *Id.* at 65. Notwithstanding that assumption, the Court held—unanimously—that the bookstores could not be seized on mere probable cause:

> [W]hile the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may

> be seized on probable cause ... it is otherwise when materials presumptively protected by the First Amendment are involved.

Id. at 63; *id.* at 68 (Blackmun, J., joining majority's Part III); *id.* at 70 (O'Connor, J., joining majority's Part III); *id.* at 83 (Stevens, J., dissenting on other grounds).The Fourth and First Amendments do not permit the pre-trial restraint of expressive works until the government shows at an adversary hearing that it can prove both "the elements of a RICO violation" and that "the assets seized were forfeitable[.]" *Id.* at 66. It is "the risk of prior restraint"—*i.e.*, the risk that the seizure would irremediably abridge expression—"that motivates this rule." *Id.* at 63–64.

Fort Wayne Books recognizes, like other decisions of this Court, that a property seizure may implicate provisions of the Bill of Rights in addition to the Fourth Amendment. *See, e.g., United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993) ("The Fourth Amendment does place restrictions on seizures conducted for purposes of civil forfeiture, but it does not follow that the Fourth Amendment is the sole constitutional provision in question when the Government seizes property subject to forfeiture.") (citation omitted); *Soldal v. Cook County*, 506 U.S. 56, 70 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands."). And, like other cases. *Fort Wayne Books* recognizes that the procedural protections that attend a seizure vary with the effect that seizure might have. Where a seizure risks abridging constitutional rights in addition to those the Fourth Amendment alone guarantees, additional

safeguards are constitutionally required to prevent government overreaching. *See, e.g.*, *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973) ("A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material.").

The restraint of the Petitioners' assets implicates the Fourth, Fifth, Sixth, and First Amendments. The seizure is a "meaningful interference with [the Petitioners'] possessory interests" in their assets. *United States v. Jones*, 132 S.Ct. 945, 951 n.5 (2012). The Petitioners have not been afforded due process in contesting the restraint. It threatens their structural right to the assistance of their counsel of choice. Legal advocacy is protected speech; a seizure that denies a defendant the right to counsel of choice, no less than a seizure of books or films, denies an individual his right to speech, denies society access to that speech, and depletes the marketplace of protected ideas. As with other prior restraints on speech, restraints on the right to counsel of choice have unknowable and potentially grave consequences. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). Furthermore, legal advocacy (particularly against the government) constitutes political speech. Thus, a seizure that threatens to irremediably deny a defendant his right to counsel of choice is constitutionally unreasonable when it is supported by only probable cause. Rather, the procedural safeguards that attend potential prior restraints on speech require the government to adduce additional evidence. Otherwise, the government could veto a defendant's choice of counsel with bare allegations.

Applying *Fort Wayne Books* to pre-trial restraints on assets needed to retain counsel is harmonious with this Court's precedents. It also promotes judicial efficiency by providing a single framework courts can apply whether the forfeiture targets "the proceeds of" or property "involved in" a crime. This defers for another day the open question of whether the Sixth Amendment categorically precludes restraining legitimately earned assets (as opposed to alleged proceeds of crime) needed to hire counsel of choice.[1]

A. The right to counsel of choice is of a nature with the rights to speak, associate, and petition the government.

By articulating defendants' cases to prosecutors, judges, and jurors, the Nation's criminal defense

---

[1]The rationale of *Caplin & Drysdale* and *Monsanto* is limited to proceeds of a crime, title to which vests in the sovereign when the crime is committed. *Caplin & Drysdale*, 491 U.S. at 627; *Monsanto*, 491 U.S. at 614. It is unclear that the "relation-back" doctrine can constitutionally apply to property only "involved in" an alleged crime, like the Petitioners' home, because such assets were legitimately earned. *United States v. Bajakajian* recognizes that distinction because it holds that the Excessive Fines Clause requires that a forfeiture of property "involved in" a crime not be "grossly disproportional to the gravity of the defendant's offense." 524 U.S. 321, 334 (1998). *Bajakajian* further recognizes the distinction by holding that proportionality of the forfeiture depends on the circumstances of the crime and the offender's characteristics. *Id.* at 338 (noting that the undeclared currency "was the proceeds of legal activity" and that the defendant was "not a money launderer, a drug trafficker, or a tax evader.").

lawyers enable defendants to efficaciously exercise their First Amendment rights to speak against the government and to petition the courts. Accordingly, this Court has repeatedly said that the Sixth Amendment right to counsel effectuates the right to be *heard*:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Powell, 287 U.S. at 68–69 (quoted in *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938)). The importance of having the assistance of counsel of choice can hardly be overstated. It is "fundamental" to due process in every individual case, *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932), as well as a structural component of the adversary system, *Gonzalez-Lopez*, 548 U.S. at 150.

At trial, counsel works to ensure that the defendant's case is informed by independent, professional judgment about what to say, when to say it, and how to say it. The Sixth Amendment deprives a trial court of any discretion to preclude defense counsel from making a closing summation, even at an "open and shut" bench trial. *Herring v. New York*, 422 U.S. 853, 862–63 (1975). It guarantees that a defendant can confer with his counsel during an overnight trial recess. *Geders v. United States*, 425 U.S. 80, 88 (1976). It reserves to a defendant and his lawyer the choices of whether and when to present the defendant's testimony. *Brooks v. Tennessee*, 406 U.S. 605, 612–13 (1972).

Counsel plays even more crucial a role before trial. In a reactive prosecution, like the rape case in *Powell*, "the most critical period of the proceedings for [the] defendants" will be "from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important ... ." 287 U.S. at 57. The Sixth Amendment recognizes the importance of preparing to meet the government's case by guaranteeing counsel throughout a "criminal prosecution," not just at trial. When formal charges are preceded by a years-long investigation, counsel's work begins well before arraignment. Throughout the investigatory phase, defense counsel speaks to and negotiates with the prosecution on his client's behalf, often obviating the need for a trial. Two unindicted co-conspirators in this case, for example, reached deals with the government before indictment and pled guilty to informations. Petitioner's Brief at 8–11.

The essence of defense counsel's work throughout a prosecution, then, is to speak for the client. Accordingly, while a criminal defense attorney's speech in service of his client can be regulated, this Court unanimously agreed that it is protected by the First Amendment. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) (Kennedy, J., for a plurality); *id.* at 1075 (Rehnquist, C.J., for the Court); *id.* at 1082 (O'Connor, J., concurring).

Moreover, a defense lawyer's speech on behalf of a client—in and out of the courtroom—is of the highest constitutional order:

> The [First Amendment vagueness] inquiry is of particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State. Petitioner, for instance, succeeded in preventing the conviction of his client, and the speech in issue involved criticism of the government.

Id. at 1051 (Kennedy, J., for the Court). Dominic Gentile's speech on behalf of his client "concern[ed] allegations of police corruption" in the case and "question[ed] the judgment of an elected public prosecutor." *Id.* at 1035–36. Other criminal cases have likewise brought to light embarrassing and corrupt government practices. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318–19 (2009) ("Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials."). A government veto

over the defendant's choice of counsel insulates official corruption and incompetence from exposure.

Correspondingly, this Court has recognized that the First Amendment protects legal advocacy in civil cases, in which there is no express constitutional right to counsel. "[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." *NAACP v. Button*, 371 U.S. 415, 429 (1963).

Button is one of several cases recognizing that the First Amendment protects litigants' access to specialized counsel—especially when the government would prefer those litigants to have other counsel or no counsel. *Button* invalidated a Virginia statute intended to criminalize the referral of potential desegregation cases to the NAACP, "which has a corporate reputation for expertise in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *Id.* at 422; *see id.* at 445–46 (Douglas, J., concurring). This Court reasoned that the referral of legal causes disfavored by the state to capable counsel implicates protected expression: "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 433. That same concern is implicated when the government uses an unsubstantiated forfeiture allegation to veto the defendant's choice of counsel, as in this case.

The following year, the Court held that Virginia could not prevent a labor organization from referring its members to counsel skilled in railroad tort cases,

reasoning that specialized lawyers are indispensable to the vindication of statutory rights as well as constitutional rights:

> It soon became apparent to the railroad workers, however, that simply having these federal statutes on the books was not enough to assure that the workers would receive the full benefit of the compensatory damages Congress intended they should have. Injured workers or their families often fell prey on the one hand to persuasive claims adjusters eager to gain a quick and cheap settlement for their railroad employers, or on the other to lawyers either not competent to try these lawsuits against the able and experienced railroad counsel or too willing to settle a case for a quick dollar.

Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar, 377 U.S. 1, 3–4 (1964). *Accord Union Mine Workers of Am. Dist. 12 v. Illinois State Bar*, 389 U.S. 217, 222 (1967).

Likewise, defendants denied their choice of counsel can "fall prey on the one hand to persuasive [prosecutors] eager to gain [large forfeitures] for their [employer], or on the other to lawyers ... too willing to settle" a case. The Department of Justice keeps forfeited assets. *See* 28 U.S.C. § 524(c) (establishing the DOJ Assets Forfeiture Fund). And DOJ exhorts its prosecutors to use the forfeiture laws aggressively to ensure it meets its annual budget targets. *See James Daniel Good*, 510 U.S. at 55–56 & n.2. Forfeitures make up an ever-burgeoning share of DOJ's budget: "Annual revenues into the Assets Forfeiture Fund from

forfeited assets increased from $500 million in 2003 to $1.8 billion in 2011 ... ." GAO, Report to Congressional Requesters, Justice Assets Forfeiture Fund at 1 (July 2012) (www.gao.gov/assets/600/592349.pdf). The government's self-interest in forfeiting people's property may explain its unconventional theory in this case and is itself a matter of public concern that is discussed only when counsel is retained.

The First Amendment also prevents the government from indirectly curtailing a litigant's ability to raise legitimate arguments. *Legal Servs. Corp. v. Velasquez* held that Congress could not condition funds for legal aid organizations on those organizations' not raising legal challenges to state welfare laws. 531 U.S. 533, 548–49 (2001). The majority reasoned that the provision was meant to keep ideas disfavored by the government out of court: "The statute is an attempt to draw lines around the LSC program to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of courts to consider." *Legal Services*, 531 U.S. at 546. Four justices dissented but only because they believed Congress could constitutionally fund one type of suit but not another: "No litigant who, in the absence of LSC funding, would bring a suit challenging existing welfare law is deterred from doing so by" the challenged statute. *Id.* at 554 (Scalia, J., dissenting). The dissent did not take issue with the majority's premise that government action that "operates to insulate current [laws] from constitutional scrutiny and certain other legal challenges [implicate] central First Amendment concerns." 531 U.S. at 547.

Legal Services recognized that government action that has the effect of removing certain arguments from the courtroom implicates the First Amendment—particularly when the government is the adverse party. *Button* and *Brotherhood of Railroad Trainmen* recognized that erecting barriers to the retention of specialized counsel keeps such speech out of the courtroom. The belated money-laundering charge and forfeiture allegation in this case will result in the withdrawal of the lawyers familiar with the facts, the government's theories, and the relevant law—the lawyers best positioned to spot issues and raise arguments against the government's novel theory of prosecution. If unjustified by substantial evidence, this will effect an unconstitutional prior restraint on speech, whether the prosecution intends that result or it is merely incidental to its money-laundering and forfeiture allegations.

B. The retention or appointment of alternate counsel does not mitigate the threatened constitutional violations.

The speech that a defendant's counsel of choice enables is important not only for its contribution to the Nation's political discourse, but also because it is a critical component of the criminal justice system itself. That is the import of the fact that the right to counsel is a *structural* right. *Gonzalez-Lopez*, 548 U.S. at 150. A defendant forced to proceed to trial without his counsel of choice because his assets were wrongfully restrained suffers an irremediable constitutional injury regardless of the quality of his alternate counsel:

> Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

Gonzalez-Lopez, 548 U.S. at 148.

Underpinning the right to counsel (as well as the related rights to confrontation and compulsory process) is the idea that the adversary system reliably yields accurate outcomes only if each side has symmetrical skill. *See* Akhil Reed Amar, *The Bill of Rights* 115–16 (1998) (discussing "the symmetry principle" reflected in the Sixth Amendment). "[The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson v. Zerbst*, 304 U.S. 458, 402–03 (1938). This symmetry is indispensable to our faith that the system reliably yields just outcomes, whether they are the product of trial or plea. In fact, the rationale for why plea bargaining does not undermine confidence in our justice system's outcomes depends on that symmetry. *See Brady v. United States*, 397 U.S. 742, 752 (1970) (reasoning that plea

bargaining is acceptable because it is predicated on a "mutuality of advantage" to both parties).

The adversary system relies most heavily on parity of skill between the parties in cases like this, where the government brings a novel and potentially flawed theory of prosecution. Because judges in a common-law system depend on able counsel to expose and analyze the issues, the system presupposes a robust market for legal services: "By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Legal Services*, 531 U.S. at 545. The health of our adversarial criminal justice system contributes, in turn, to the overall vitality of our democracy. "The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state ... ." *Gentile*, 501 U.S. at 1035 (plurality).

The person facing conviction has the greatest incentive to identify and retain the best lawyer he can. Thus, this Court has never doubted that an accused is constitutionally entitled (subject to court rules and the like) to "be defended by the counsel he believes to be the best." *Gonzalez-Lopez*, 548 U.S. at 145; *accord Wheat v. United States*, 486 U.S. 153, 159 (1988) ("[T]he right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment ... ."); *see also Powell*, 287 U.S. at 53 ("[T]he right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."). To a great degree, then, the system

relies for its proper functioning on defendants' election of counsel to supply the requisite symmetry:

> Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. ... Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses.

Gideon, 372 U.S. at 344.

Allowing the prosecution to interfere with the defendant's choice of counsel on a minimal evidential showing compromises symmetry and harms the system. Prosecutors are not indifferent as to who represents a defendant:

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial.

Gonzalez-Lopez, 548 U.S. at 150.

If protected from undue interference, individual defendant's choices redound, through Adam Smith's invisible hand, to everyone's benefit, inspiring public confidence in judicial outcomes. A robust, independent defense bar contributes more and better speech to the criminal prosecutions of citizens by their government.

On the other hand, members of a defense bar beholden to prosecutors for their ability to earn a living can hardly be expected to put the government to its burden in every case. "An informed, independent judiciary presumes an informed, independent bar." *Legal Services*, 531 U.S. at 545.

The *Gonzalez-Lopez* holding is just one of many recognizing the reality that money amplifies speech. A well-funded defense may be stronger than one that only meets constitutional standards. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) ("[T]he Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy ... ."). By capping the amount a defendant can spend on his defense, the prosecution (and the court) abridge his speech:

> In any economy operated on even the most rudimentary principles of division of labor, effective public communication requires the speaker to make use of the services of others. An author may write a novel, but he will seldom publish and distribute it himself. A freelance reporter may write a story, but he will rarely edit, print, and deliver it to subscribers. To a government bent on suppressing speech, this mode of organization presents opportunities: Control any cog in the machine, and you can halt the whole apparatus. License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them. Predictably, repressive regimes have exploited these principles by

> attacking all levels of the production and dissemination of ideas.

McConnell v. FEC, 540 U.S. 93, 251 (2003) (opinion of Scalia, J.) (citations omitted). The right to counsel of choice is no more absolute than the right to other forms of speech, but a limit on the amount an accused can spend for his defense demands the same scrutiny as any other prior restraint on speech.

Citizens United v. FEC recognized that government efforts to muffle speech by limiting a person's spending are a form of prior restraint: "The rule that political speech can not be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity." 558 U.S. 310, 350 (2010). This applies as much to political speech in the courtroom as to political speech on the campaign trail: "A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life *which are hardly within the power, let alone the duty*, of a State to correct or cushion." *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring) (emphasis added).

Government can also abridge freedom of speech by favoring one group of speakers (like court-appointed lawyers) over another group of speakers (like privately retained lawyers):

> Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By

> taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

Citizens United, 558 U.S. at 340–41.

As with all prior restraints, allowing the government to restrain an accused's assets by meeting a minimal burden threatens both an individual and a societal constitutional harm. A Department-of-Justice-imposed cap on the amount that criminal defendants can spend on their defense favors the government's views on criminal-justice issues by diminishing or silencing opposing views. Indeed, this case is exceptional in that the defendants and their counsel have managed to bring this Court their challenge to the restraining order through two interlocutory appeals. "'[M]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.'" *Citizens United*, 558 U.S. at 335–36 (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)).

Our system's faith that confrontation between the prosecution and the accused reliably separates the guilty from the not-guilty depends on the endurance of "a healthy, independent defense bar" to ensure "a truly equal and adversarial presentation of the case." *Caplin & Drysale*, 491 U.S. at 647–48 (Blackmun, J., dissenting). The unjustified denial of counsel of choice corrodes this pillar of our system by threatening "to decimate the criminal defense bar" and bring about the "'virtual socialization of criminal defense work in this country.'" *Id.* at 651, 647 (Blackmun, J., dissenting).

II. Recognizing that seizures of assets needed to retain counsel pose the same dangers as other prior restraints on protected speech resolves the issues dividing the courts of appeals.

The circuit courts of appeals have splintered over the process due defendants who are denied use of assets presumptively theirs for their defense. The circuits differ, first, in the framework they employed to analyze the issue. Most circuits used the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to decide what process is due. *See United States v. E-Gold, Ltd.*, 521 F.3d 411, 417 (C.A.D.C. 2008); *United States v. Holy Land Foundation for Relief*, 493 F.3d 469, 475 (C.A.5 2007); *United States v. Jamieson*, 427 F.3d 394, 406 (C.A.6 2005); *United States v. Farmer*, 274 F.3d 800, 803–04 (C.A.4 2001); *United States v. Jones*, 160 F.3d 641, 645 (C.A.10 1998); *United States v. Michelle's Lounge*, 39 F.3d 684, 694–96 (C.A.7 1994); *United States v. Monsanto*, 924 F.2d 1186, 1193 (C.A.2 1991) (*en banc*); *United States v. Crozier*, 777 F.2d 1376, 1383 (C.A.9 1985). The Eleventh relied on the speedy-trial

test of *Barker v. Wingo*, 407 U.S. 514 (1972). *Kaley*, 677 F.3d at 1321. No circuit considered the applicability of *Fort Wayne Books v. Indiana*.

The courts of appeals appear divided also over what, if anything, a defendant has to show before a court is required to convene a hearing on a pre-trial asset seizure. At least three circuits in addition to the Eleventh Circuit have admonished that "'[d]ue process does not automatically require a hearing and a defendant may not simply ask for one.'" *Farmer*, 274 F.3d at 805 (quoting *Jones*, 160 F.3d at 647); *see Jamieson*, 427 U.S. at 407 (adopting *Jones*). These courts require a defendant to show he lacks other assets with which to retain counsel as a prerequisite to challenging the government's seizure. Language in the decisions of other circuits suggests hearings are more generously afforded in those parts of the country. *See E-Gold*, 521 F.3d at 419; *Holy Land Foundation*, 493 F.3d at 474; *Monsanto*, 924 F.2d at 1198; *United States v. Roth*, 912 F.2d 1131, 1134 (C.A.9 1990); *United States v. Lewis*, 759 F.2d 1316, 1324–25 (C.A.8 1985); *United States v. Long*, 654 F.2d 911, 915 (C.A.3 1981).

When a hearing is afforded, the circuits disagree about which party bears the burden of proof and what standard of proof is required.[2] Characterizing the Petitioners as "the movants," the Eleventh Circuit burdened them with demonstrating that there was no probable cause to believe the restrained assets were

---

[2] "Burden of proof" and "standard of proof" are used in the same way as the Court used these terms in *Microsoft Corp. v. i4i Ltd. Partnership*, 131 S.Ct. 2238, 2245 n.4 (2011).

forfeitable. *Kaley*, 677 F.3d at 1322. Without stating a reason, the Fourth Circuit likewise requires defendants to negate the government's claim to restrained assets. *Farmer*, 274 F.3d at 805. Other circuits task the government with demonstrating that there is probable cause to believe the assets are forfeitable. *E-Gold*, 521 F.3d at 419; *Holy Land*, 493 F.3d at 474; *Monsanto*, 924 F.2d at 1197; *Roth*, 912 F.2d at 1134; *Lewis*, 759 F.2d at 1324–25; *Long*, 654 F.2d at 915.

Because dicta in this Court's *Monsanto* opinion suggested that mere probable cause sufficed, the Fifth and Second Circuits lowered the standard of proof they required the government to meet. *See Holy Land*, 493 F.3d at 474 & n.6; *Monsanto*, 924 F.2d at 1195. On remand from *Monsanto*, the Second Circuit stopped requiring the government to "demonstrate the likelihood that the assets are forfeitable." *Monsanto*, 924 F.2d at 1189. Similarly, before *Monsanto*, the Fifth Circuit required adherence to the same procedures that Federal Rule of Civil Procedure 65 specifies for injunctions and restraining orders, imposing "a higher burden than probable cause." *Holy Land*, 493 F.3d at 474 n.6. The Third, Eighth, and Ninth Circuits still apply Rule 65 to pre-trial restraints on allegedly forfeitable assets and require the government to show it will likely prove both the underlying crimes and the traceability of the restrained assets. *Roth*, 912 F.2d at 1134; *Lewis*, 759 F.2d at 1324–25; *Long*, 654 F.2d at 915. Were it not for *Monsanto*'s dicta, other circuits, like the D.C. Circuit which addressed the issue only recently, might have imposed a higher standard of proof. *See E-Gold*, 521 F.3d at 419.

Those circuits that accept probable cause as the standard of proof disagree on whether an indictment conclusively establishes probable cause to believe the defendant committed the alleged crime underlying the forfeiture claim. Some circuits require a court evaluating a restraint on allegedly forfeitable assets to consider the weight of the government's evidence on the underlying charges as well as on the connection of the assets to the alleged crimes. *E-Gold*, 521 F.3d at 419; *Monsanto*, 924 F.2d at 1197. But, reasoning that a defendant can not question the allegations in the indictment until trial, the Sixth, Tenth, and Eleventh Circuits limit the inquiry to whether there is probable cause to believe the restrained assets are traceable to the charged offenses. *Kaley*, 677 F.3d at 1327; *Jamieson*, 427 F.3d at 406; *Jones*, 160 F.3d at 648.

To achieve consistency across circuits and with this Court's precedents, government seizures of assets that could fund a criminal defense must be analyzed consistently with other, similar seizures. When a seizure threatens to abridge enumerated constitutional rights, the Fourth Amendment requires that a strong evidential showing support it. *Fort Wayne Books*, 489 U.S. at 63–64. That is why a seizure that will take ideas out of circulation pending trial must be justified at an adversary hearing by proof that the seized items are likely to be forfeited after trial. *Id.* When the government seizes only one or two copies of an allegedly obscene work, in contrast, a showing of probable cause suffices because there is no threat to the marketplace of ideas. *Id.*; *New York v. P.J. Video, Inc.*, 475 U.S. 868, 874–75 (1986); *Heller v. New York*, 413 U.S. 483, 492 (1973).

Fort Wayne Books thus answers the question left open in *Monsanto*: When a restraint on allegedly forfeitable property might frustrate the exercise of the right to counsel of choice, the government must show at an adversary hearing more than mere probable cause to sustain the seizure. Otherwise, a defendant could erroneously be denied the assistance of counsel of choice on the basis of an untested, one-sided presentation—a risk as constitutionally grave as that entailed in a seizure of books and films. That the DOJ stands to benefit financially from any error heightens the need for an adversary hearing. "The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking. That protection is of particular importance here, where the Government has a direct pecuniary interest in the outcome of the proceedings." *James Daniel Good*, 510 U.S. at 55–56 (footnote omitted). DOJ's dependence on forfeiture for its operations now almost reaches the two-billion-dollar mark. GAO, Report to Congressional Requesters, Justice Assets Forfeiture Fund at 1 (July 2012) (www.gao.gov/assets/600/592349.pdf). This dependence continues to deepen; the government's appetite for forfeiture is apparently insatiable.

At the adversary hearing, the government bears the burden of proving that the assets it wants restrained are likely to be forfeited. It is the government that seeks to displace the *status quo* when it seizes property in a person's possession based on unsubstantiated allegations. No reason is apparent for why pornographic books and films are presumptively protected while other allegedly forfeitable assets are presumptively the materialization of the "economic

power of organized crime." *Caplin & Drysdale*, 491 U.S. at 630. This is especially so given the Court's assumption in *Fort Wayne Books* that the seized books and films were "forfeitable (like other property such as a bank account or a yacht) when it is proved that these items are property actually used in, or derived from," racketeering. 489 U.S. at 65. Just as expressive works are presumed protected, the law presumes that the Petitioners own their house. *See Bradshaw v. Ashley*, 180 U.S. 59, 63 (1900) ("Generally speaking, the presumption is that the person in possession is the owner ... If there be no evidence to the contrary, proof of possession, at least under a color of right, is sufficient proof of title."); *Ricard v. Williams*, 20 U.S. 59, 105 (1822) ("Undoubtedly, if a person be found in possession of land, claiming it as his own, in fee, it is *prima facie* evidence of his ownership ... .") (Story, J.). Accordingly, the government has the burden because it seeks a change in the presumptively legal state of affairs. The fact that the government initially moves for the restraining order *ex parte* and without notice neither alters the common-law presumption of ownership nor shifts the burden.

The government does not meet its burden by showing mere probable cause to believe the accused committed the underlying offenses and that the assets are the proceeds of or were involved in the crimes. Rather, the rationale of *Fort Wayne Books* requires the government to show that it is likely to prove at trial that a crime was committed and that the assets are traceable to that crime in a way that renders them forfeitable. It has to show, in other words, that it will likely prove every element necessary to the forfeiture

of the assets. This follows from the acknowledgment that a restraint on the accused's right to counsel of choice is no less serious than any other prior restraint on speech: It stifles the defendant's speech, hinders the adversary system, impoverishes the marketplace of ideas on matters of public concern, and discriminates against speakers on the basis of wealth.

Those courts that have precluded any inquiry into the weight of the government's evidence on the underlying charges incorrectly believed probable cause was the applicable standard of proof. They also incorrectly believed that *Costello v. United States*, 350 U.S. 359 (1956), made a grand jury's probable-cause determination sacrosanct. A grand jury's finding of probable cause "is enough to call for trial of the charge on the merits." *Id.* at 363. That is no trifling matter, as innumerable double-jeopardy cases discussing the "'embarrassment, expense and ordeal'" entailed in a criminal prosecution attest. *Evans v. Michigan*, 133 S.Ct. 1069, 1075 (2013). But it does not follow that a grand jury's probable-cause finding is incontestable when the government seeks to impose additional, onerous burdens on an accused. The pre-trial detention of a defendant, for example, entails considering the strength of the government's case in an adversary hearing:

> Detainees have a right to counsel at the detention hearing. They may testify in their own behalf, present information by proffer or otherwise, and cross-examine witnesses who appear at the hearing. The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by

> statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community. The Government must prove its case by clear and convincing evidence. Finally, the judicial officer must include written findings of fact and a written statement of reasons for a decision to detain. The Act's review provisions provide for immediate appellate review of the detention decision.

United States v. Salerno, 481 U.S. 739, 751–52 (1987) (citations omitted). *See Monsanto*, 924 F.2d at 1194–95.

Costello held only that a defendant is not entitled to a trial on the question of whether there is enough evidence to justify a trial. 350 U.S. at 363–64. The decision is grounded in judicial economy, not on any mystique about the grand jury's function. That is evident from the fact that the holding encompasses informations as well as indictments: "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." *Id.* at 363 (footnote omitted). Moreover, the opinion, by its own terms, is not controlling when a defendant raises a question about the fairness of his upcoming trial: "Defendants are not entitled ... to a rule which would result in interminable delay *but add nothing to the assurance of a fair trial*." *Id.* (emphasis added). A hearing on whether the government has solid grounds for denying the defendant his counsel of choice substantially contributes to a fair trial.

The strength of the government's overall case is also relevant to whether the pre-trial restraint is proportional to those crimes the government can ultimately prove. In some cases, the government will restrain assets "involved in" a crime that is not serious enough to support the forfeiture. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (holding that the forfeiture of $357,144 was an unconstitutional punishment for failing to declare the exportation of currency because it was disproportional to the offense). There are two reasons why federal prosecutors can be relied upon to seek in every case the broadest restraining order its allegations can trigger without regard to proportionality. The first is that DOJ is dependent on forfeiture for its operating revenue. The second is that the prosecution gains a tactical advantage whenever it forces a defendant to trial without his first-choice counsel—even if it ultimately can not prove the charges supporting the forfeiture. This case is illustrative. The government added the money-laundering conspiracy charge only when it became clear that the charges it initially brought would not justify a restraining order broad enough to force the Petitioners to discharge the lawyers already familiar with the case. The government then convinced the district court and the Court of Appeals that the validity of the restraining order in no way depended on whether it could ever substantiate the money-laundering charge.

The money-laundering charge pays its way for the prosecution if it only hobbles the Petitioners' defense against the original fraud charges. And those are weak. The government has not been able to identify any

entity that considers itself a victim of the supposed fraud. Petitioners' Brief at 8–11. In that regard, this case recalls *Morissette v. United States*, 342 U.S. 246 (1952). Joseph Morissette hauled rusting, spent bomb casings off a government bombing range, flattened them, sold the metal for scrap, and was surprised to be convicted of stealing government property. He admitted knowingly taking the casings from government land but denied any intent to steal, maintaining since his arrest that he believed the casings were discarded. *Id.* at 247–49. This Court reversed Morisette's conviction without dissent, stating that a jury properly instructed that Morisette's specific intent to steal was an essential element "might have refused to brand Morissette as a thief." *Id.* at 276. It is probably for similar reasons that a jury acquitted the Petitioners' co-defendant.

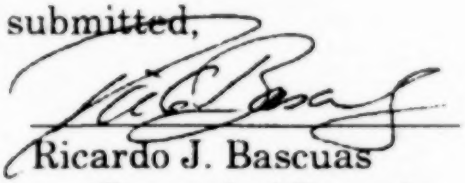
Recognition that the right to counsel of choice is a form of protected expression and affording *Fort Wayne Books'* safeguards to seizures that threaten that right resolves the issues vexing the appellate courts. First, it unequivocally requires an adversarial, evidentiary hearing when the accused challenges the restraint. Second, it makes clear that the government, as the party requesting the restraint, has the burden of proof. Third, it requires that the government adduce evidence sufficient to show that it is likely to prove *both* that the assets are "the proceeds of" or were "involved in" the charged crimes *and* that the defendant in fact committed those crimes. It does all this without resort to the vagaries of the *Eldridge* balancing test. It is simply the logical result of the fact that, to be reasonable under the Fourth Amendment, a seizure

threatening to deny fundamental rights, silence speech, and harm the adversary system requires greater evidential justification than one that does not pose those risks.

CONCLUSION

This Court should reverse the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



Jonathan Hacker
Co-Chair, Supreme Court Amicus Committee
National Ass'n of Criminal Defense Lawyers
1625 Eye Street, N.W.
Washington, D.C. 20006
202-383-5285

Ricardo J. Bascuas
Counsel of Record
Professor, University of Miami School of Law
1311 Miller Drive
Coral Gables, Fla. 33146
305-284-2672
rbascuas@law.miami.edu

Counsel for NACDL

5 July 2013

AMICUS CURIAE BRIEF

No. 12-464

In the Supreme Court of the United States

KERRI L. KALEY AND BRIAN P. KALEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF NEW YORK COUNCIL OF DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JONATHAN P. BACH
Counsel of Record
MICHAEL J. BERKOVITS
COOLEY LLP
1114 Avenue of the Americas
New York, NY 10036
(212) 479-6000
jbach@cooley.com

Counsel for Amicus Curiae
New York Council of Defense Lawyers

July 8, 2013

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

Table of Authorities ii

Statement of Interest 1

Summary of Argument 2

Argument 3

I. The Second Circuit's *Monsanto* Doctrine 3

II. Experience Under The Second Circuit's *Monsanto* Doctrine 4

Conclusion 10

TABLE OF AUTHORITIES

CASES

CFTC v. Walsh,
2010 WL 882875 (S.D.N.Y. Mar. 9, 2010) . . 4, 5

In re All Funds in Accounts in the Names Registry Publishing, Inc.,
887 F. Supp. 435 (E.D.N.Y. 1995) . 4, 8

Oyekoya v. United States,
108 F. Supp. 2d 315 (S.D.N.Y. 2000) 4

Rita v. United States,
551 U.S. 338 (2007) 1

SEC v. Coates,
1994 WL 455558 (S.D.N.Y. Aug. 19, 1994) . . 4, 7

SEC v. FTC Capital Mkts., Inc.,
2010 WL 2652405 (S.D.N.Y. June 29, 2010) . 4, 5

SEC v. McGinn, Smith & Co.,
2012 WL 4932587 (N.D.N.Y. Oct. 15, 2012) . . . 4

SEC v. Princeton Economic Int'l Ltd.,
2000 WL 1559673 (S.D.N.Y. Oct. 19, 2000) . 4

SEC v. Sekhri,
2000 WL 1036295 (S.D.N.Y. July 26, 2000) . . . 4

United States v. All Funds on Deposit, etc.,
767 F. Supp. 36 (E.D.N.Y. 1991) 4, 7

United States v. All Funds on Deposit in Account Nos. 94660869, 9948199297, 80007487, 9115606297, 9116151903, & 9931127481, 2012 WL 2900487 (S.D.N.Y. July 6, 2012) 4, 7

United States v. Berg, 998 F. Supp. 395 (S.D.N.Y. 1998) 4, 9

United States v. Bonventre, 2011 WL 1197853 (S.D.N.Y. Mar. 30, 2011) . 4, 7

United States v. Booker, 543 U.S. 220 (2005) 1

United States v. Clarkson Auto Electric, Inc., 2012 WL 345911 (W.D.N.Y. Feb. 1, 2012) . . 4, 8

United States v. Daugerdas, 2012 WL 5835203 (S.D.N.Y. Nov. 7, 2012) 4, 6, 7, 9

United States v. Dupree, 781 F. Supp. 2d 115 (E.D.N.Y. 2011) . . . 4, 8, 9

United States v. Egan, 2010 WL 3000000 (S.D.N.Y. July 29, 2010) . 4, 7

United States v. Galante, 2006 WL 3826701 (D. Conn. Nov. 28, 2006) . . . 4

United States v. Greenwood, 865 F Supp. 2d 444 (S.D.N.Y. 2012) 8, 9

United States v. Hatfield,
2010 WL 1685826
(E.D.N.Y. Apr. 21, 2010) 4, 5, 9

United States v. Hewett,
2003 WL 21355217 (S.D.N.Y. June 10, 2003) . . 9

United States v. Kam,
2011 WL 3039589
(E.D.N.Y. Mar. 18, 2011) . 4, 5, 7

United States v. Kramer,
2006 WL 3545026 (E.D.N.Y. 2006) 7

United States v. Martinez,
2011 WL 4949873
(S.D.N.Y. Oct. 18, 2011) 4, 7

United States v. Millan,
836 F. Supp. 1007 (S.D.N.Y. 1993) 4

United States v. Monsanto,
491 U.S. 600 (1989) 2, 3

United States v. Monsanto,
924 F.2d 1186 (2d Cir. 1991) . . . . . *passim*

United States v. Schlegel,
No. 2:06-cr-00550-JS-ETB
(E.D.N.Y. May 19, 2010) 9

United States v. Walsh,
712 F.3d 119 (2d Cir. 2013) . . . 7

STATEMENT OF INTEREST

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 250 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York.[1] NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL's *amicus* briefs have been cited by this Court or concurring justices in cases such as *Rita v. United States*, 551 U.S. 338, 373 n.3 (2007) (Scalia, J., concurring in the judgment) and *United States v. Booker*, 543 U.S. 220, 266 (2005).

NYCDL has long advocated for the recognition of due process rights where the government restrains funds necessary for those accused of crimes to retain counsel. Nearly 25 years ago, when this Court first addressed the constitutionality of pretrial restraints of a criminal defendant's assets, NYCDL submitted an *amicus* brief urging this Court to require a pretrial, adversarial hearing at which a defendant could broadly

---

[1] This brief is filed with the written consent of the parties. Pursuant to Sup. Ct. R. 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

challenge the basis for any such restraints. *See* Brief of the Committees on Criminal Advocacy, and Criminal Law of the Association of the Bar of the City of New York, et al. as Amici Curiae, *United States v. Monsanto*, 491 U.S. 600 (1989) (No. 88-454).

SUMMARY OF ARGUMENT

We understand that one of the principal issues now before the Court is whether a criminal defendant whose assets have been restrained is entitled to a pretrial, adversarial hearing at which he may challenge the evidentiary support and legal theory underlying the charges against him. In this brief, we summarize the experience of trial courts within the Second Circuit, which have operated under a doctrine that provides for such hearings. We observe that, as confirmed by reported case law, recognition of due process rights – including the right to challenge probable cause at a pretrial hearing – has not resulted in strain or abuse of the system. Rather, relatively few such hearings have been held, and the availability of a hearing has often encouraged resolution by counsel without the need for judicial intervention. The experience in the Second Circuit indicates that a rule of law providing for relatively broad pretrial hearing rights can be administered efficiently while promoting important constitutional rights.

ARGUMENT

I. The Second Circuit's *Monsanto* Doctrine

In *Monsanto*, 491 U.S. 600, this Court expressly left open the question "whether the Due Process Clause requires a hearing before a pretrial restraining order can be imposed." *Monsanto*, 491 U.S. at 615 n.10. It also left open the question of the appropriate scope of any such hearing. The Second Circuit addressed these questions on remand. It held that a criminal defendant is entitled to a pretrial, adversary hearing to challenge a restraint of assets needed to fund his defense. *United States v. Monsanto*, 924 F.2d 1186, 1198 (2d Cir. 1991). It further held that the scope of such a hearing would include "the existence of probable cause" not only with respect to the particular assets under restraint but also with respect to the defendant's commission of the charged offenses. *Id.* at 1197, 1203.

The Second Circuit specified that, "at such a hearing," a district court may receive and consider "evidence and information that would be inadmissible under the Federal Rules of Evidence," and that "grand jury determinations of probable cause may be reconsidered." *Id.* at 1203. This doctrine has remained unchanged over more than the past two decades.

II. Experience Under The Second Circuit's *Monsanto* Doctrine

In the nearly 25 years that have elapsed since the Second Circuit ruled in *Monsanto*, there have been fewer than 25 reported cases at the district court level concerning instances in which defendants invoked their right to a pretrial hearing,[2] and only a subset of those

---

[2] Decisions available on Westlaw or Lexis include *United States v. Daugerdas*, 2012 WL 5835203 (S.D.N.Y. Nov. 7, 2012); *SEC v. McGinn, Smith & Co.*, 2012 WL 4932587 (N.D.N.Y. Oct. 15, 2012); *United States v. All Funds on Deposit in Account Nos. 94660869, 9948199297, 80007487, 9115606297, 9116151903, & 9931127481*, 2012 WL 2900487 (S.D.N.Y. July 6, 2012); *United States v. Clarkson Auto Electric, Inc.*, 2012 WL 345911 (W.D.N.Y. Feb. 1, 2012); *United States v. Martinez*, 2011 WL 4949873 (S.D.N.Y. Oct. 18, 2011); *United States v. Bonventre*, 2011 WL 1197853 (S.D.N.Y. Mar. 30, 2011); *United States v. Dupree*, 781 F. Supp. 2d 115 (E.D.N.Y. 2011); *United States v. Egan*, 2010 WL 3000000 (S.D.N.Y. July 29, 2010); *SEC v. FTC Capital Mkts., Inc.*, 2010 WL 2652405, at *20 (S.D.N.Y. June 29, 2010); *United States v. Hatfield*, 2010 WL 1685826 (E.D.N.Y. Apr. 21, 2010); *United States v. Kam*, 2011 WL 3039589 (E.D.N.Y. Mar. 18, 2011), *report and recommendation adopted*, Order, *United States v. Kam*, No. 1:10-cr-00875-RJD (July 20, 2011); *CFTC v. Walsh*, 2010 WL 882875 (S.D.N.Y. Mar. 9, 2010); *United States v. Galante*, 2006 WL 3826701 (D. Conn. Nov. 28, 2006); *Oyekoya v. United States*, 108 F. Supp. 2d 315, 317 (S.D.N.Y. 2000); *SEC v. Princeton Economic Int'l Ltd.*, 2000 WL 1559673 (S.D.N.Y. Oct. 19, 2000); *SEC v. Sekhri*, 2000 WL 1036295 (S.D.N.Y. July 26, 2000); *United States v. Berg*, 998 F. Supp. 395 (S.D.N.Y. 1998); *In re All Funds in Accounts in the Names Registry Publishing, Inc.*, 887 F. Supp. 435 (E.D.N.Y. 1995); *SEC v. Coates*, 1994 WL 455558 (S.D.N.Y. Aug. 19, 1994); *United States v. Millan*, 836 F. Supp. 1007 (S.D.N.Y. 1993); *United States v. All Funds on Deposit, etc.*, 767 F. Supp. 36 (E.D.N.Y. 1991).

have included a challenge to probable cause with respect to the underlying offense.[3] Even assuming the total number of cases is larger than the number of reported cases, the very small number of reported cases suggests that the total number of all such cases is within manageable limits and that defendants invoke their right to a pretrial hearing only in exceptional cases.

A search of district court docket reports in the Second Circuit for "Monsanto" yields an additional five cases. *See* Notice of Motion for *Monsanto* Hearing, *United States v. King*, No. 1:10-cr-00122-JGK-1 (S.D.N.Y. July 29, 2011); Notice of Motion, *United States v. $304,041.01 on Deposit at Citibank, N.A.*, No. 1:10-cv-04858-LAP (S.D.N.Y. Apr. 15, 2011) (related proceeding to *Bonventre*, *supra*); Memorandum in Support of Motion for *Monsanto* Hearing, *United States v. Account No. 7F1-998717*, No. 1:10-cv-00443-FB-RML (E.D.N.Y. June 25, 2010); Notice of Motion for *Monsanto* Hearing, *id.*, ECF No. 55; Notice of Motion for *Monsanto* Hearing, *id.*, ECF No. 58; Cross Motion for Review of Bail Determination, *United States v. Schwab*, No. 6:05-cr-06161-DGL-JWF (W.D.N.Y. Jan. 26, 2007); Motion for *Monsanto* Hearing, *United States v. Account #05964419069*, No. 1:02-cv-00072-jgm (D. Vermont Feb. 4, 2003).

[3] *See, e.g.*, *Kam*, 2011 WL 3039589, at *5 n.7 (challenging only whether restrained funds were traceable to commission of alleged offense); *Hatfield*, 2010 WL 1685826, at *2 n.2 (same); *SEC v. FTC Capital Mkts., Inc.*, 2010 WL 2652405, at *7–8 (in civil proceeding with parallel criminal proceeding, defense challenged only whether restrained funds were traceable to commission of alleged offense); *CFTC v. Walsh*, 2010 WL 882875, at *1 (motion heard jointly by judges presiding over criminal proceeding and parallel civil proceeding).

One explanation for the relative infrequency of such hearings – as opposed to, say, the greater frequency of evidentiary suppression hearings – is that defense attorneys representing clients with restrained assets, and thus with limited if any ability to pay attorneys' fees, are unlikely to devote the time and effort needed to pursue a hearing unless they believe there is a genuine possibility that they will prevail. In other words, attorneys confronted with limited resources are likely to refrain from seeking such hearings where the requisite probable cause can easily be established. They are more likely to seek a pretrial hearing where there are legitimate reasons to challenge a restraint and where there is an expectation of success that would result in payment of legal fees.[4]

For the same reason, defense counsel who do pursue hearings are likely to limit their scope to those areas that present the clearest grounds for challenge. There is little incentive to explore collateral issues that would serve only to make the hearings longer and more expensive.

A separate and further reason for the infrequency of these hearings is that district courts have retained discretion to fashion flexible rules that may limit the availability of hearings in appropriate circumstances. For example, district courts have required defendants seeking a hearing to first establish that they have

---

[4] *See, e.g.*, Letter to the Court, *United States v. Daugerdas*, No. 1:09-cr-00581-WHP (S.D.N.Y. Jan. 27, 2010), ECF No. 67 (defense counsel advising the court that no grounds existed to move for a *Monsanto* hearing, where court had set a deadline for such motions).

genuine need for the restrained funds. *E.g.*, *Kam*, 2011 WL 3039589, at *11 ("[D]istrict courts in this circuit uniformly require a prehearing showing of a legitimate need for the seized funds."); *United States v. Kramer*, 2006 WL 3545026, at *4 n.4 (E.D.N.Y. 2006); *Martinez*, 2011 WL 4949873, at *2; *Egan*, 2010 WL 3000000, at *5. District courts have also at times required defendants to state a *prima facie* case for non-restraint before a hearing will be granted. *See All Funds on Deposit*, 2012 WL 2900487, at *2 (denying defendant's motion for a hearing for failure to establish *prima facie* case that assets were not forfeitable or that defendant had insufficient unrestrained assets to secure private counsel); *Daugerdas*, 2012 WL 5835203 at *2–3 (same); *Dupree*, 781 F. Supp. 2d at 141 (stating that defendant must make *prima facie* showing of his indigence and of the absence of probable cause for the restraint); *Martinez*, 2011 WL 4949873, at *2; *but see United States v. Bonventre*, 2013 WL 3023011, at *3 (2d Cir. June 19, 2013) (recently holding that a defendant must establish a genuine need for the restrained funds but that no *prima facie* showing regarding the merits of the restraint is required); *SEC v. Coates*, 1994 WL 455558, at *4 (scheduling hearing in the absence of any indication that court had required defendant to make a *prima facie* showing); *All Funds on Deposit, etc.*, 767 F. Supp. at 42 (placing initial burden on government to demonstrate that defendant had sufficient unrestrained assets to pay for private counsel before a hearing would be required).

Similarly, the Second Circuit has affirmed the discretion of district courts to limit the number of witnesses where appropriate. *United States v. Walsh*, 712 F.3d 119, 125 (2d Cir. 2013) (affirming quashing of

defense subpoenas of potential government witnesses for *Monsanto* hearing where government's case agent testified). Indeed, in light of the Second Circuit's holding that district courts "may receive and consider . . . evidence and information that would be inadmissible under the Federal Rules of Evidence," *Monsanto*, 924 F.2d at 1203, it is not uncommon for the government to proceed by presenting a single witness – typically its case agent – who summarizes the anticipated testimony of other witnesses in hearsay form and then faces cross-examination by defense counsel. *See In re All Funds in Accounts*, 887 F. Supp. at 448 (hearing consisted of testimony of case agent, supported by exhibits, including recordings of government witnesses); *Clarkson Auto Electric*, 2012 WL 345911, at *1 (defendant cross-examined case agent); *Dupree*, 2011 WL 3235637, at *3–4 (court considered affidavit and live cross-examination of forensic accountant for Federal Bureau of Investigation); *United States v. Greenwood*, 865 F. Supp. 2d 444, 446 (S.D.N.Y. 2012) (case agent gave live testimony and cross-examination and both sides presented documentary evidence). In short, district courts within the Second Circuit have safeguarded important due process rights while at the same time managing individual matters as required by the circumstances.

Recognition of a criminal defendant's right to a pretrial hearing in the Second Circuit has also had the beneficial result of encouraging counsel to reach resolution by mutual agreement, often obviating the need for a hearing. It is not uncommon for prosecutors to release funds sufficient for legal fees following negotiations with the defense or limited coaxing by the

court. *See* Letter from Stanley J. Okula, Jr. to the Honorable William H. Pauley III, *United States v. Daugerdas*, No. 1:09-cr-00581-WHP (S.D.N.Y. Jan. 10, 2013) (government consented to lift restraint on specific account); Minute Entry, *Account No. 7F1-998717*, No. 1:10-cv-004430-FB-RML (E.D.N.Y. Nov. 2, 2010) (parties resolved *Monsanto* issue); *Hatfield*, 2010 WL 1685826, at *4 (court suggested and government agreed to accede to a "bridge loan" to the defendant; *see* Stipulation and Order, *United States v. Schlegel*, No. 2:06-cr-00550-JS-ETB (E.D.N.Y. May 19, 2010)); Minute Entry, *Dupree*, No. 1:10-cr-00627-KAM (E.D.N.Y. Apr. 25, 2011) (court suggested that government could eliminate the need for a hearing by voluntarily releasing *Monsanto* funds); Letter from Craig A. Welin to the Honorable Miriam G. Cedarbaum and George B. Daniels, *United States v. Greenwood*, No. 1:09-cr-00722-MGC (S.D.N.Y. Aug. 26, 2010) (government did not object to release of funds after court granted *Monsanto* hearing); *United States v. Hewett*, 2003 WL 21355217, at *1 (S.D.N.Y. June 10, 2003) (defense raised *Monsanto* issue with government and government agreed not to restrain assets); *Berg*, 998 F. Supp. at 399 n.16 (court suggested that defense negotiate with government regarding *Monsanto* issue). The ability of counsel to negotiate resolution of these issues has limited any undue burden on the courts.

CONCLUSION

The experience within the Second Circuit demonstrates that relatively broad pretrial hearing rights can be meaningfully accommodated within the judicial system, without resulting in excess or abuse, while safeguarding important constitutional rights.

Dated: New York, New York
July 8, 2013

Respectfully submitted,

Jonathan P. Bach
Counsel of Record
Michael J. Berkovits
COOLEY LLP
1114 Avenue of the Americas
New York, New York 10036
Phone: (212) 479-6000
Fax: (212) 479-6275
jbach@cooley.com

Counsel for Amicus Curiae
New York Council of Defense Lawyers